Supreme Court, U.S.
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In The
Supreme Court of the United States

MIRROR IMAGE INTERNET, INC., XCELERA INC., ALEXANDER M. VIK, GUSTAV VIK AND HANS MAGNUS FAJERSON,

Petitioners,

v.

PARFI HOLDING AB, PLENTEOUS CORPORATION, GRANDSEN LTD. AND GUNNAR GILLBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Delaware Supreme Court "in a case of first impression in Delaware" established a rule of law that violates the Federal Arbitration Act and conflicts with longstanding decisions of the United States Supreme Court, by holding that:

   (a) when construing broad arbitration clauses, Delaware courts must apply a presumption *against* arbitration of breach of fiduciary duty claims concerning Delaware corporations;

   (b) if a claim is "independently and separately assertable" without reference to a contract, it is not arbitrable, even where the wording of the relevant arbitration clause is broad enough to encompass such claim; and

   (c) an arbitration clause only applies to disputes that "touch on" the legal rights created by the contract in which the arbitration clause is found, even where "the arbitration clause is broad in scope."

PARTIES TO THE PROCEEDING

All parties are listed in the caption. Petitioner Xcelera Inc. was formerly known as Xcelera.com Inc., and was so named in the complaint.

RULE 29.6 STATEMENT

Petitioner Xcelera Inc. is publicly traded on the American Stock Exchange and is the parent of Petitioner Mirror Image Internet, Inc. No public company owns 10% or more of Xcelera Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Xcelera Inc., Mirror Image Internet, Inc., Alexander M. Vik, Gustav Vik and Hans Magnus Fajerson respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Delaware in this case.

OPINIONS BELOW

The opinion of the *en banc* Supreme Court of Delaware (App. 1-19) is reported at ___ A.2d ___ (Civ. A. No. 18507, 2002 WL 31477125) (Del. Nov. 11, 2002). The memorandum of the *en banc* Supreme Court of Delaware denying Petitioners' Motion for Reargument (App. 68-69) is not reported. The opinion of the Delaware Court of Chancery (App. 20-67) is reported at 794 A.2d 141.

JURISDICTION

The Supreme Court of Delaware issued its opinion on November 4, 2002. Petitioners timely filed a Motion for Reargument on November 15, 2002. After requesting and receiving an opposition brief from Respondents, the Supreme Court of Delaware denied Petitioners' Motion for Reargument on December 9, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statute is Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, which provides:

> *Validity, irrevocability, and enforcement of agreements to arbitrate*
>
> A written provision in any maritime transaction or a contract evidencing a

> transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case presents questions of broad importance to the enforceability of arbitration clauses under the Federal Arbitration Act ("FAA" or the "Act") and has far-reaching implications for national and international commerce. The Supreme Court of Delaware in *Parfi Holding AB, et al. v. Mirror Image Internet, Inc., et al.* held that a claim for breach of fiduciary duty concerns a "central doctrine" of Delaware State law, and therefore established a presumption against arbitration of such claims, permitting arbitration only if there is "a clear expression of intent to arbitrate . . ." The Supreme Court of Delaware also precluded arbitration of all claims that do not "require the existence of a contract" in order to be asserted, however broadly worded the arbitration clause and regardless of whether the claims arise under federal or state law. Finally, the Delaware Supreme Court restricted arbitration to claims that "touch on" the rights created in the underlying contract, irrespective of the arbitration clause's breadth. Each of these new interpretative principles violates the FAA by exempting entire classes of claims from arbitration or by retracting the scope of valid arbitration clauses. These principles also conflict with this Court's jurisprudence interpreting and applying the FAA.

Delaware enjoys special prominence in shaping corporate law on a national and international scale. The Court of Chancery is one of the most influential tribunals in the United States with respect to matters of corporate law and is among the most respected with regard to other complex business and commercial matters. *See* Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 1-1 at 1 (1998). It is the nation's principal forum for the resolution of internal corporate governance disputes, *id.*, serving as "the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted." *See* Delaware Court of Chancery homepage, http://courts.state.de.us/chancery. Well over half of the Fortune 500 companies are Delaware corporations, and "Delaware jurisprudence in the corporate field is internationally preeminent." E. Norman Veasey, *Collins Jacques Seitz: Paradigm of Principle, Passion, Professionalism and Persuasion*, 40 Vill. L. Rev. 559, 561 (1995); *see also* Felicia Smith, *Corporate Governance: Seasoned Companies*, 1279 PLI/Corp. 119, 132 (Practicing Law Institute Corporate Law and Practice Course Handbook Series 2001) ("Of all jurisdictions in the United States, Delaware is preeminent because a majority of the most prominent and well-capitalized corporations have been formed under the Delaware General Corporation Law").

Delaware's acknowledged preeminence in the development of corporate law—and in particular, of fiduciary obligations—gives its courts a singular influence over corporate law. Delaware's special position creates a substantial risk that the Delaware Supreme Court's new rules will reverse, in the field of corporate governance, the "liberal federal policy toward arbitration agreements" required by the FAA, and emphasized by this Court. Review by this Court is necessary to assure that the liberal

federal policy toward arbitration is not replaced by judicial hostility when arbitration is sought on matters implicating "central doctrines" of state law.

A. Statutory Background

The basic purpose of the Federal Arbitration Act is to create a federal policy of enforceability of arbitration agreements. *See generally* 9 U.S.C. § 2 *et seq.* To do so, Congress enacted Section Two of the Act, which was designed to overcome courts' refusals to enforce agreements to arbitrate. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995). Congress's intent was to overcome judicial hostility to arbitration and to assure that courts place arbitration agreements on the same footing as other contracts. *Id.* at 271 (citation omitted). Based in part on international convention, the FAA is also intended to encourage recognition and enforcement of commercial arbitration agreements in international contracts. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995) (citing 9 U.S.C. § 201 *et seq.* (codifying the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997)).

B. Factual Background

1. The Parties and the Underwriting Agreement

The underlying litigation involves a contract among foreign individuals and entities concerning the ownership of Mirror Image Internet, Inc. ("Mirror Image"), an Internet "start-up" company incorporated in Delaware. In 1999, Mirror Image's then-parent, Mirror Image Internet AB ("Mirror AB") sought European investors. (App. 3.) Defendant-Petitioner Xcelera Inc. ("Xcelera") agreed to invest $1.75 million in Mirror Image in exchange for a

controlling interest in the Company, and Plaintiff-Respondent Plenteous Corporation (a Panamanian corporation controlled by a Norwegian businessman) agreed to invest $250,000. (App. 3-26.) That agreement was memorialized in an Underwriting Agreement signed on March 29, 1999. (App. 80-105.)

Though the Underwriting Agreement concerned a Delaware corporation, its signatories and beneficiaries were mostly Scandinavian, and it was governed by Swedish law.[1] (*See* App. 104 (Section 20.2)). Among other things, the Underwriting Agreement addressed: the issuance of Mirror Image shares (*see* App. 83 (Section 2, "Share Issue and Subscription")); Mirror Image's governance structure (*see* App. 87 (Section 5.4)); Mirror Image's capitalization (*see* App. 87-88 (Section 5.5, "The Shares")); the controlling interest transferred to Xcelera (*see* App. 97 (Section 7.2)); the allocation of Mirror Image shares to Mirror AB stockholders, *id.* (Section 7.3); Xcelera's majority ownership position (Section 7.3); and the method and governing law by which disputes would be resolved (*see* App. 104 (Section 20.2)).

The Underwriting Agreement contained a broad arbitration clause which provided that any dispute, controversy or claim "arising out of *or* in connection with th[e] [Underwriting Agreement], *or* the breach, termination

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1 Mirror AB, Plaintiff-Respondent Parfi Holding AB's predecessor-in-interest, was a Swedish company publicly traded on the Stockholm stock exchange. Mr. Sverker Lindbo, the founder of Mirror AB who signed the Underwriting Agreement on its behalf, was a Swedish businessman. Plaintiff-Respondent Plenteous Corporation is a Panamanian-registered company operated by Atle Lygren, a Scandinavian businessman. Respondents Gunnar Gillberg ("Gillberg") and Grandsen, Ltd. ("Grandsen") were shareholders of Mirror AB, and, though not signatories to the Underwriting Agreement, also acquired shares of Mirror Image pursuant to the Underwriting Agreement. Gillberg is a Swedish businessman who lives in Sweden, while Grandsen Ltd. is an entity based on the Isle of Man in the United Kingdom. Grandsen is run by Per Lundin, a Swedish businessman. Xcelera was known at the time as The Scandinavia Company, and was run by Alexander Vik, a Scandinavian businessman.

or invalidity thereof, shall be settled by arbitration" in Sweden under Swedish law. *See* App. 104 (Section 20.2) (emphasis added).

2. The Litigation and the Parallel Arbitration

During 1999 and 2000, the Petitioners completed a series of four transactions involving Mirror Image stock that were designed to strengthen the financial and business condition of Mirror Image. However, a group of Mirror Image's minority shareholders, including Mirror Image's former parent, Mirror AB, contended that the transactions were part of a scheme by Xcelera to gain control of Mirror Image and dilute the interests of its minority shareholders. *See* App. 4-5, 26-34. Mirror AB's principal, Sverker Lindbo, formed Plaintiff-Respondent Parfi Holding AB ("Parfi"), a publicly-traded Swedish corporation, as a "litigation construct" charged with the sole purpose of pursuing litigation against Xcelera. (App. 4, 46.) The Respondents (hereinafter, collectively, "Parfi") then filed an arbitration proceeding in Sweden against Xcelera pursuant to the Underwriting Agreement.[2] (App. 6-7, 37-42.) The arbitration challenged the four transactions on the basis that the Petitioners (hereinafter, collectively, "Xcelera") had violated and misused the Underwriting Agreement as part of a scheme to unfairly dilute the minority shareholders by means of these transactions.

On November 16, 2000, some six months after the commencement of the Swedish Arbitration, Parfi filed this action in the Delaware Court of Chancery. The present action is largely identical in substance to the Swedish Arbitration, as Parfi again alleged in the Complaint that the

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[2] While Respondents Gillberg and Grandsen were not formally named as claimants in the Arbitration, they had a direct financial interest as parties to a Joint Prosecution Agreement and beneficiaries of the Underwriting Agreement. (App. 45-46.)

four transactions diluted the minority shareholders' interests. (App. 7, 26-34.) The Complaint accused Xcelera of breach of fiduciary duty and fraud in connection with the four challenged transactions. Its central theme was an alleged dilution scheme arising out of the Underwriting Agreement and implemented via those four challenged transactions -- precisely the dispute presented in the Arbitration. (App. 26-45.) The Underwriting Agreement formed a central element of Parfi's Complaint, was attached as an exhibit to the Complaint, and is described therein at length. The transactions and events at issue in the two proceedings were not just related, they were the same.

3. The Proceedings Below

a. The Decision of the Delaware Court of Chancery

Xcelera moved to dismiss the Complaint under Del. Ch. Ct. R. 12(b)(1) on the ground, among others, that the arbitration clause in the Underwriting Agreement required Parfi to arbitrate its claims. (App. 8, 36.) In granting summary judgment for Xcelera,[3] the Court of Chancery determined that the arbitration clause was broadly worded, and that the claims in the Complaint fell within that broad scope:

> [T]he plain language of the arbitration clause . . . does not solely require the arbitration of claims that the Underwriting Agreement was breached or was invalid. The first phrase of this clause, which requires arbitration of

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3 The Court of Chancery converted Xcelera's motion to a motion for summary judgment because "Parfi and the defendants have both submitted portions of the arbitration record in support of their respective positions, and I can perceive no prejudice to considering the unambiguous aspects of these documents." (App. 36 n.23.)

> claims "arising out of" the Agreement, would seem to cover direct claims for breach of the Agreement or fraud in the inducement. But the drafters of the clause were not content to cover only those claims arising directly under the contract. *Instead, they went on to draft additional language requiring the arbitration of claims "connected" not only to the Underwriting Agreement, but more broadly to the "breach" or the "invalidity" of that Agreement.* The language is, as the defendants argue, quite expansive in scope. The clause is therefore most logically read as requiring Parfi to arbitrate any claims connected to any alleged breach of the Underwriting Agreement. . . .

(App. 43) (emphasis in original). The Court of Chancery refused to allow Parfi "a second forum in which to seek damages based on the same conduct of Xcelera already examined by the arbitration panel" because "[b]y its own words in the arbitration proceeding, Parfi has again and again set forth its view that the Challenged Transactions *constituted a breach* of the Underwriting Agreement, and were evidence of Xcelera's fraudulent intent at the time the Underwriting Agreement was consummated." (App. 43-44.) (emphasis added).

b. The Decision of the Delaware Supreme Court

On appeal, the Delaware Supreme Court reversed. Noting that "[t]his is a case of first impression in Delaware" (App. 10) and "[the Court's] first opportunity to articulate the approach for determining the arbitrability of claims" (App. 10 n. 15), the Delaware Supreme Court adopted a broad, general principle that "[w]hen contracting parties provide for the arbitration of claims in their agreement, the arbitration provision, *no matter how broadly drafted,* can reach

only the claims within the scope of that contract." (App. 2) (emphasis added). Further clarifying this holding, the Court stated that arbitration clauses, "no matter how broadly construed, can extend only so far as the series of obligations set forward in the underlying agreement." (App. 11-12.) If a particular claim does not "touch on the legal rights created" by the underlying contract, that claim cannot be arbitrated. (App. 2.) In another formulation of the same principle, the Court precluded enforcement of the Arbitration clause if the claim in dispute "would be independently and separately assertable" had no contract existed between the parties. (App. 14.)

Applying this new analysis, the Delaware Supreme Court held that Parfi's breach of fiduciary duty claims were not arbitrable. Because a majority stockholder's fiduciary duties to minority stockholders are "independently grounded in Delaware law," the fiduciary duty claims do not "depend on the existence of the Underwriting Agreement" and therefore may not be arbitrated, no matter how broad the arbitration clause:

> Xcelera's fiduciary duties to Mirror Image consist of a set of rights and obligations that are independent of any contract and need be submitted to arbitration only if the claims based on fiduciary duties touch on the obligations created in the Underwriting Agreement.
>
> * * *
>
> We conclude that the analysis must turn on the issue of whether the fiduciary duty claims would be assertable had there been no Underwriting Agreement. We hold that they would be independently and separately assertable in that situation and are therefore not 'in connection with' the Agreement.

(App. 13-14.) The Delaware Supreme Court further indicated that, because breach of fiduciary duty claims involve a central doctrine of Delaware law, Delaware courts should apply a presumption *against* arbitrability of such claims:

> The right to vindicate breaches of fiduciary duty inflicted by a majority stockholder on the minority is a central doctrine of Delaware law. Absent a clear expression of an intent to arbitrate breach of fiduciary duty claims, Parfi has the right to have the merits of those claims adjudicated by the Court of Chancery.

(App. 17.) Though the arbitration clause was concededly "very broad," the Delaware Supreme Court, based on its view that the fiduciary duty claims were independent of the Underwriting Agreement (and, for that reason, "beyond its scope"), concluded that the absence of a "clear expression of intent to arbitrate the fiduciary duty claims" mandated reversal. (App. 17.) It thus interpreted the parties' intent based on a presumption in favor of litigation and against arbitration.

REASONS FOR GRANTING THE PETITION

The Court should review the Delaware Supreme Court's decision because the interpretative principles it adopts violate the FAA and conflict with this Court's interpretation and application of the FAA. The Delaware Supreme Court's decision has the potential to erode federal arbitration policy due to Delaware's unique status as the place of incorporation of more than half of this country's publicly-traded companies and the forum in which thousands of foreign corporations elect to form their domestic subsidiaries. Both domestic and foreign entities that have entered into arbitration agreements in reliance on

their enforceability under the FAA now face the prospect that those arbitration agreements will not be given full effect by Delaware courts. This Court should grant certiorari to overcome the Delaware Supreme Court's hostility to the arbitration of claims concerning a "central doctrine of Delaware law," and to prevent Delaware from circumscribing the scope of the FAA.

Furthermore, Delaware's unilateral determination that it may establish different interpretive principles with respect to arbitration of claims involving a "central doctrine" of Delaware law, creates an exemption to the FAA's framework that has ready applicability to the jurisprudence of other states. Embracing the reasoning of Delaware, other states may also determine that "central doctrines" of their jurisprudence mandate the adoption of presumptions adverse to arbitrability and contrary to the FAA. Thus, the opinion is a template for decisions that would extend the effect of the case beyond its considerable impact on corporate disputes governed by Delaware law.

I. The Delaware Supreme Court's Decision Conflicts With the FAA and This Court's Consistent Interpretation and Application of the FAA

On an issue that was a "matter of first impression," and its "first opportunity to articulate the approach for determining the arbitrability of claims" (App. 10, 10 n. 15), the Delaware Supreme Court established as a matter of Delaware law a series of principles concerning the interpretation and application of arbitration agreements which, taken together, exempt broad categories of claims from arbitration. These principles impermissibly restrict the scope of the FAA and directly conflict with this Court's interpretation and application of the Act.

A. The Supreme Court's Longstanding Interpretation and Application of the FAA

The Supreme Court has long held that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (same); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000) (same); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1995) (same); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (same); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (same); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (same). Under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (same); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) (same); *Mitsubishi Motors*, 473 U.S. at 626; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (same).

The FAA is also "a substantive rule applicable in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996). The Supreme Court has held that the FAA "declared a national policy favoring arbitration," and that "nothing in the Act indicat[es] that the broad principle of enforceability is subject to any additional limitations under State law." *Southland*, 465 U.S. at 10-11; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). Where states have adopted rules concerning arbitration that conflict with the FAA's broad presumption in favor of arbitrability, those state laws have been invalidated by the Supreme Court. *See, e.g., Doctor's Assocs.*, 517 U.S. at 688

(striking Montana law); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73, 282 (1995) (striking Alabama law); *Perry*, 482 U.S. at 490-92 (striking California law); *Southland*, 465 U.S. at 16 (striking California law).

B. The Delaware Supreme Court's New Rules Violate this Court's Interpretation and Application of the FAA

1. The Delaware Supreme Court's Decision Creates A Presumption *Against* Arbitration

In its Opinion, the Delaware Supreme Court supplanted the "liberal federal policy favoring arbitration" with a presumption against arbitrability of breach of fiduciary duty claims arising under Delaware law. The catalyst of this shift was the Delaware Supreme Court's assessment that the right to vindicate a breach of fiduciary duty is a "central doctrine" of Delaware law. (App. 19.) The Opinion adopted the rule that "[a]bsent a clear expression of an intent to arbitrate breach of fiduciary duty claims," such claims cannot be subject to arbitration. *Id.* Thus, under Delaware law, the presumption is now a presumption *against* arbitration and in favor of litigation of Delaware breach of fiduciary duty claims.

This Court has repeatedly and unqualifiedly held that the FAA requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 461 U.S. at 24-25 (emphasis added); *see also First Options* 514 U.S. at 944-45; *Mastrobuono*, 514 U.S. at 62 n.8; *Mitsubishi Motors*, 473 U.S. at 626; *Dean Witter*, 470 U.S. at 221. Applying this presumption "in favor of arbitration," this Court has previously rejected arguments that an arbitration clause must specifically enumerate a claim in order for such a claim to be arbitrable. *See Mastrobuono*, 514 U.S. at 61-62 (enforcing arbitral award

of punitive damages notwithstanding the fact that arbitration clause did not explicitly provide for punitive damages because "ambiguities as to the scope of the arbitration clause itself [must] be resolved in favor of arbitration"). Delaware's new "clear expression of intent" standard violates this principle, because it commands that a Delaware breach of fiduciary duty claim can only be arbitrated when the arbitration clause explicitly and "clearly" states that the parties intend to arbitrate any breach of fiduciary duty claims that might arise. The effect of this new Delaware principle is to require that there be *no doubt* as to the parties' intentions – an approach that plainly conflicts with the longstanding jurisprudence of this Court.

Delaware's new standard also subordinates the FAA and this Court's rulings to Delaware's determination that on a "central doctrine of Delaware law" (as determined by a Delaware state court), a different and contrary approach shall apply. This assertion of control over state-law claims contravenes the very purpose of the FAA, which is "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law, and had been adopted by American courts." *Waffle House*, 534 U.S. at 289; *see also Circuit City*, 532 U.S. at 118 (same); *Allied-Bruce*, 513 U.S. at 270 (noting that "the basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"). As this Court recently held in *Green Tree*, the relative "importance" of a particular cause of action is insufficient to permit a court to violate the FAA and to override the provisions of a valid arbitration clause:

> [E]ven claims arising under a statute designed to further important social policies may be arbitrated because "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," the statute serves its functions.

531 U.S. at 90 (quoting *Gilmer*, 500 U.S. at 28). Indeed, this Court has repeatedly rejected attacks on arbitration that rest on suspicion of arbitration as a method of "weakening the protection afforded in the substantive law to would-be complainants." *See Rodriguez de Quijas*, 490 U.S. at 481; *see also Green Tree*, 531 U.S. at 90 (same).

As these cases show, the Delaware Supreme Court cannot suspend the requirements of the FAA simply because " the right to vindicate breaches of fiduciary duty ... is a central doctrine of Delaware law." (App. 19.) Faced with a broad arbitration clause in an international agreement among Scandinavian companies and businesspeople, the Delaware Supreme Court did just that. It created a rule of law that permits Delaware courts to retain control over breach of fiduciary claims involving corporations registered in Delaware. In so doing, the Delaware Supreme Court expressed the "judicial hostility" that the FAA was enacted to prevent and that this Court has refused to permit.

2. The Delaware Supreme Court Now Precludes Arbitration of Any Claim that Could be Asserted Independently From a Contract

The Delaware Supreme Court's opinion held incorrectly that a court's determination of arbitrability "must turn on the issue of whether the fiduciary duty claims would be assertable had there been no Underwriting Agreement." (App. 14.) The Delaware Supreme Court determined that "Xcelera's fiduciary duties to Mirror Image consist of a set of rights and obligations that are independent of any contract" because a majority stockholder's fiduciary duties are required under Delaware corporation law. (App. 13-14.) Reasoning that Parfi's fiduciary duty claims "would be independently and separately assertable" regardless of whether Parfi and

Xcelera had any pre-existing contractual relationship, the Delaware Supreme Court held that such claims *could not* fall within the scope of the Underwriting Agreement's broad arbitration provision. (App. 14.) While the Delaware Supreme Court's discussion was framed in terms of fiduciary duty issues, nothing in this portion of the opinion limits the application of the analysis to such claims. Instead, the analysis establishes a rule of law in Delaware that, irrespective of the breadth of the language of the relevant arbitration clause, a claim can never be arbitrated if it could be *independently and separately* asserted without the existence of an agreement between the parties.

Delaware's new test of arbitrability contradicts this Court's interpretation of the FAA. This Court has required parties to arbitrate many claims involving duties or obligations arising not under a contract, but instead under a statute, whether federal or state. *See, e.g., Green Tree*, 531 U.S. at 89 (noting that "we have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims"). Specifically, this Court has compelled arbitration of claims brought under the following federal statutes:

- Title I of the Americans with Disabilities Act ("ADA"), *see Waffle House*, 534 U.S. at 282;
- the Truth in Lending Act ("TILA") and the Equal Credit Opportunity Act ("ECOA"), *see Green Tree*, 531 U.S. at 83-84;
- the Age Discrimination in Employment Act ("ADEA"), *see Gilmer*, 500 U.S. at 21;

- the Securities Act of 1933, *see Rodriguez de Quijas*, 490 U.S. at 483;

- the Securities Exchange Act of 1934, *see McMahon*, 482 U.S. at 238;

- the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *id.* at 242;

- the Sherman Antitrust Act, *see Mitsubishi Motors*, 473 U.S. at 628; and

- the California Franchise Investment Law, *see Southland*, 465 U.S. at 10-17.

Under the Delaware Supreme Court's new test of arbitrability, none of these statutes would be arbitrable. Each of these statutory claims is "independently and separately assertable" insofar as it does not depend on a duty created by a contract between two parties. An individual's duty not to engage in anticompetitive behavior arises under the Sherman Act, not from a sales contract with his distributor; a broker's duty not to violate the securities laws arises from the '33 and '34 Acts, not from a contract with his client; and an employer's duty not to violate the ADA or the ADEA arises from the federal statutes precluding such discrimination, not from the employer's contract with his employee. Yet, if a broad arbitration clause requires it, each of these statutory claims has been compelled to arbitration under this Court's prior rulings.

The Delaware Supreme Court's new rule, if left intact, will preclu le not only arbitration of breach of fiduciary duty claims arising under Delaware law, but of any claim that "consist[s] of a set of rights and obligations that are independent of any contract." (App. 13-14.) Delaware's new rule thus has the potential to circumscribe

the arbitrability of claims of statutory, Constitutional, and common law rights that exist independently of contractual rights. Both the reasoning and the scope of the Delaware Supreme Court's opinion are in conflict with the FAA as it has been interpreted and applied by this Court.

3. The Delaware Supreme Court Has Impermissibly Restricted Arbitration to Claims that "Touch On" the Legal Rights Created By the Contract

The Delaware Supreme Court also adopted an "unequal" rule concerning its interpretation of arbitration clauses, holding that "[w]hen contracting parties provide for [arbitration], the arbitration provision, *no matter how broadly drafted*, can reach only the claims within the scope of the contract." (App. 2) (emphasis added). Enforcement of an arbitration provision, whatever its text provides, is now limited to those claims which "touch on" or "bear on the duties and obligations" set forth in the underlying agreement. (App. 2, 12.) This truncated application of an arbitration clause conflicts with this Court's ruling that the FAA "place[s] arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24; *see also Dean Witter*, 470 U.S. at 219-20. Thus the FAA precludes a state from adopting a policy that refuses to give full effect to the plain language of an arbitration clause. As this Court stated in *Allied-Bruce*:

> What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing,"

> directly contrary to the [FAA]'s language and Congress' intent.

513 U.S. at 281.

The Delaware Supreme Court's decision also conflicts with this Court's holding in *Gilmer*. In *Gilmer*, this Court compelled arbitration of an ADEA claim pursuant to an arbitration clause requiring Gilmer, a securities representative, to arbitrate "any controversy . . . arising out of [his] employment or termination of employment." *Gilmer*, 500 U.S. at 23. However, the agreement that contained the arbitration provision was not Gilmer's employment contract, but rather the "Uniform Application for Securities Industry Registration or Transfer" form that Gilmer submitted to the New York Stock Exchange:

> The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate.

Gilmer, 500 U.S. at 25 n.2.

Under Delaware's reasoning, Gilmer's employment claim would not be arbitrable because an employment discrimination claim does not "touch on" the rights created by Gilmer's New York Stock Exchange registration (the agreement containing the arbitration provision). Yet *Gilmer* required arbitration of the ADEA claim based on the text of the arbitration clause, even though the underlying contract neither created the employer-employee relationship between Gilmer and Interstate, nor "touched on" the duties arising from that relationship. The Delaware Supreme Court's reasoning cannot be reconciled with *Gilmer*, and

conflicts with Supreme Court jurisprudence requiring states to give full effect to the scope of arbitration clauses.

II. A Refusal By This Court To Review The Delaware Supreme Court's Decision Risks Serious Erosion of the FAA

A. The National and International Importance of Delaware Corporate Law Creates a Particularly Strong Risk That The FAA Will Be Eroded By the Delaware Supreme Court's Decision

The commercial implications of the Delaware Supreme Court's decision are far-reaching. Delaware is a leading domicile of incorporation for both United States and international corporations, with more than half a million business entities currently incorporated in that state. *See* Delaware Division of Corporations homepage, http://www.state.de.us/corp/. That figure includes more than 50% of all publicly-traded companies in the United States, as well as 58% of the companies presently listed in the Fortune 500. *Id.* As a result, Delaware's restrictions on the arbitrability of whole classes of claims, particularly those arising under Delaware law, have the potential to preclude arbitration of many claims that would be otherwise arbitrable under this Court's own well-established interpretation of the FAA.

The need for review is acute because here the arbitration clause is in a commercial, international agreement among foreign parties. The FAA is "based in part on an international convention . . . intended to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995) (internal quotation marks and citation omitted). Absent review by this Court, the Delaware Supreme Court's restrictive new interpretation of the FAA may force foreign

entities to litigate disputes that they intended to be resolved through arbitration, in contravention of their legitimate expectations, the FAA, and international norms.

B. The Fourth *Cox* Factor Favors Review By This Court

Although the Delaware Supreme Court's decision vacated the trial court's summary judgment award and remanded the matter to the trial court for further proceedings, the Delaware Supreme Court's decision is nonetheless appropriate for review by this Court. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court specified four categories (now commonly referred to as the "*Cox* categories") in which it will grant a petition for a writ of certiorari to review a decision by a state's highest court, even if further state court proceedings are required as a result of the highest court's ruling. The fourth of the *Cox* categories permits this Court to review a nonfinal decision in the following circumstances:

> [T]here are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

> In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 482-83.

Applying *Cox*, this Court has decided to review nonfinal state court decisions where (1) the Court's review would terminate the state proceedings, and (2) the Court's failure to review the decision could undermine an important federal law or policy. *See, e.g., Fort Wayne Books, Inc. v. Sappenfield*, 489 U.S. 46, 55-57 (1989) (granting petition for writ of certiorari on the basis of the fourth *Cox* factor in case involving whether Indiana's state RICO statute violated the First Amendment because "petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal . . . would bar further prosecution on the RICO counts at issue here"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988) (granting petition for writ of certiorari because the fourth *Cox* factor was satisfied: "[t]he federal question whether the additional workers' compensation award is barred by federal law has been finally determined by the Ohio Supreme Court, and a reversal of the Ohio Supreme Court's holding would preclude any further proceedings. In addition . . . the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production . . . [and] the decision has important implications for the regulation of federally owned nuclear production facilities in other States."); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 611-12 (1989) (granting petition for a writ of certiorari despite the fact that further proceedings were required before an Arizona trial court).

The issues Xcelera's Petition presents are similar to those presented by the petitioning party in *Belknap, Inc. v.*

Hale, 463 U.S. 491, 497 n.5 (1983). *Belknap* involved a labor dispute in which the defendant argued that the state court litigation was preempted by the federal National Labor Relations Act ("NLRA"). The Kentucky Court of Appeals rejected the defendant's preemption argument, and the Kentucky Supreme Court denied discretionary review and remanded the case to the trial court for further proceedings. On the defendant's petition for a writ of certiorari, this Court granted review under the fourth *Cox* category because the decision of the Kentucky Court of Appeals "finally disposed of the preemption issue; a reversal here would terminate the state court action; and to permit the proceedings to go forward in the state court would involve a serious risk of eroding the federal statutory policy of 'requiring the subject matter of respondents' cause to be heard by the ...Board, not by the state courts.'" *Id.* As in *Belknap*, a reversal here would terminate the state court proceeding, and allowing the matter to go forward in the state court would involve a serious risk of eroding a federal statutory policy, in this instance, the mandate of the FAA.

The present case meets all of the criteria outlined in *Cox* and applied by this Court in *Belknap*, *Fort Wayne*, *Goodyear* and *ASARCO*. The federal issue raised by Xcelera is a threshold one: if this Court reverses the Delaware Supreme Court's decision, the entire Delaware proceeding would be dismissed. Furthermore, refusing to review the Delaware Supreme Court's decision would "seriously erode federal policy" concerning the enforcement of arbitration clauses. The "liberal federal policy in favor of arbitration agreements" would also be thwarted in this specific case, because Xcelera would be required to litigate claims that should have been arbitrated under the terms of the Underwriting Agreement. Even more importantly, this Court's failure to review the Delaware Supreme Court's decision will leave in place a Delaware rule of law that contravenes the FAA by creating a presumption against arbitration of breach of fiduciary claims because they

implicate a "central doctrine" of Delaware law. For these reasons, this Petition presents an issue that can – and should – be reviewed by this Court.

III. This Court Has Jurisdiction Because The Delaware Supreme Court Considered The Issues Raised By This Petition

This Court has jurisdiction to grant Xcelera's Petition for a Writ of Certiorari because the Delaware Supreme Court considered the federal issue – whether Delaware's new approach to interpreting arbitration clauses violates the FAA – after Xcelera explicitly raised it in a detailed Motion for Reargument timely filed before the Delaware Supreme Court.

When a state's highest court indicates that it has considered a federal issue raised in a petition for rehearing, the Supreme Court can take jurisdiction and grant a petition for a writ for certiorari. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reviewing state court decision even though the federal issue was raised for the first time in a petition for rehearing). In *Eddings*, the Court noted that the petition for rehearing "specifically presented the [federal] issue and at some considerable length," and emphasized that the state court confirmed "that it had given it full consideration [to the petition] and had been 'fully advised in the premises.'" *Id.* at 115 n.9. Similarly, in *Cox*, this Court found that the federal issue had been properly presented because the state court, in denying the motion for rehearing, wrote that "[a] majority of this court does not consider this statute to be in conflict with the First Amendment." 420 U.S. at 476. *See also Richards v. Jefferson Co., Alabama*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review."); *Ungar v. Sarafite*, 376 U.S. 575, 582-83 (1964) (granting petition as to three federal

claims that were raised before the state court in a petition for rehearing).

The record below demonstrates that Xcelera raised the Opinion's conflict with the FAA before the Delaware Supreme Court, and that the Delaware Supreme Court considered the issue. Xcelera's Motion for Reargument (App. 70-74) set forth the reasons why the Delaware Supreme Court's decision conflicts with the Federal Arbitration Act and with this Court's opinions construing the FAA. In response to Xcelera's Motion for Reargument, the Delaware Supreme Court took the unusual step of requesting Parfi to provide a responsive memorandum addressing Xcelera's arguments.[4] (App. 75.) In denying Xcelera's Motion for Reargument, the Delaware Supreme Court stated that it had "carefully considered" the arguments raised in both sets of papers, and on that basis denied Xcelera's Motion for Reargument. (App. 68-69.)

Further, prior to its ruling in this case, the Delaware Supreme Court had never given any indication that it would create new law shifting the presumption against arbitration for Delaware breach of fiduciary duty claims. *See Elf Atochem N. America, Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) (noting that doubts as to arbitrability are to be resolved in favor of arbitration, and requiring arbitration of claims, including claims for breach of fiduciary duty involving a Delaware limited liability company, in a case where the Delaware Supreme Court "[did] not believe there was any doubt of the parties' intention to arbitrate *all* disputed matters.")(emphasis in original); *see also SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998) (public policy of Delaware favors arbitration and doubt as to arbitrability is to be resolved in favor of arbitration). The Delaware Supreme Court's decision that breach of fiduciary claims may not be arbitrated except in

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[4] Rule 18 of the Delaware Supreme Court Rules states that "no answer to the motion [for reargument] shall be permitted unless requested by the Court." Del. Supr. Ct. R. 18.

particular circumstances was unexpected and inconsistent not only with the FAA, but with these prior decisions. The Delaware Supreme Court itself noted the novelty of its analysis, observing that this was "a case of first impression in Delaware" and that it was the Court's "first opportunity to articulate the approach for determining the arbitrability of claims." (App. 10, 10 n. 15.) Accordingly, this Court may take jurisdiction over this appeal on the alternative ground that "the highest state court has rendered an unexpected interpretation of state law or reverse[d] its prior interpretation," thus having an impact on an issue of federal law. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 n.9 (1980); *see also Herndon v. Georgia*, 295 U.S. 441, 447-49 (1935); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930).

CONCLUSION

For the reasons stated herein, Defendants-Petitioners Mirror Image Internet, Inc., Xcelera Inc., Alexander M. Vik, Gustav Vik, and Hans Magnus Fajerson respectfully request that this Court grant their Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD.	§	No. 27, 2002
Plaintiffs Below, Appellants,	§	Court Below: Court of Chancery of the State of Delaware in and for New Castle County
v.	§	
MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,	§	C.A. No. 18507
Defendants Below, Appellees/Cross-Appellants.	§	

Submitted: August 6, 2002.
Decided: November 4, 2002.
Filed: November 4, 2002

Before **VEASEY**, Chief Justice, **WALSH**, **HOLLAND** and **STEELE**, Justices, and **RIDGELY**, President Judge, Superior Court,[*] constituting the Court en Banc.

Upon appeal from the Court of Chancery. **REVERSED** and **REMANDED**.

Melanie K. Sharp, Esquire, of Young, Conaway, Stargatt & Taylor, LLP, Wilmington, Delaware; Of Counsel: M. Frederick Pritzker, Esquire, and James W. Stoll, Esquire

[1]Sitting by designation pursuant to Del. Const. art. IV, § 12.

(argued), of Brown Rudnick Berlack Israels LLP, Boston, Massachusetts, for Appellants.

Jesse A. Finkelstein, Esquire, and Thad J. Bracegirdle, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; Of Counsel: Peter J. Macdonald, Esquire (argued), Robin L. Alperstein, Esquire, of Hale and Dorr, LLP, New York, New York for Appellees.

VEASEY, Chief Justice:

In this appeal, we hold that contracting parties who provide for the arbitration of disputes in their agreements need submit to arbitration only those claims that touch on the legal rights created by their contract. The Court of Chancery dismissed fiduciary duty claims brought by minority stockholders of a Delaware corporation on the ground that the transactions giving rise to the stockholders' causes of action were also the factual basis for contract claims relating to the Underwriting Agreement through which they acquired their interests in the company. The Vice Chancellor reasoned that the arbitration clause the stockholders placed in their Underwriting Agreement required them to bring all of their claims relating to the transactions, including the fiduciary duty claims, before the arbitration tribunal.

We disagree with this holding because the fiduciary duty claims the minority stockholders asserted are not based on the rights and obligations created by the underlying agreement that required arbitration of claims "arising out of or in connection with" the agreement itself. When contracting parties provide for the arbitration of claims in their agreement, the arbitration provision, no matter how broadly drafted, can reach only the claims within the scope of the contract, and the fiduciary duty claims here are beyond that scope.

Accordingly, we reverse the judgment of the Court or Chancery dismissing the minority stockholders' claims

and we remand the matter to the Court of Chancery for proceedings consistent with this opinion.

Facts

Mirror Image Internet, Inc., is a Delaware corporation involved in designing hardware to speed information retrieval and transmission across the Internet. Mirror Image was formed in 1997 as a subsidiary of Mirror AB, a Swedish corporation.

As a struggling start-up enterprise, Mirror Image required frequent infusions of capital to stay operational. Mirror AB could not, on its own, meet the financing needs of its subsidiary. By 1999, Mirror AB had to seek outside investors who could provide enough funds so that Mirror Image could meet its short-term obligations and stave off bankruptcy.

Mirror Image found two investors. In March of 1999, Mirror Image entered into an agreement (the "Underwriting Agreement") with a corporation that is currently known as Xcelera Inc., and Plenteous Corp. Xcelera is a Cayman Islands Holding company. Plenteous is a Panamanian corporation. The Underwriting Agreement provided Mirror Image $2 million in capital, $1.75 million of which would be contributed by Xcelera and the balance provided by Plenteous. Once the Agreement closed, Xcelera became the controlling stockholder with a 62% interest in Mirror Image. Plenteous and two other stockholders, Grandsen, Ltd. and Gillberg,[2] who were Mirror AB stockholders, were given the right to participate in the offering. They provided the balance of the $2 million and became minority stockholders in the corporation along with Mirror AB. In addition to setting the price and quantity terms of the stock offering, the Agreement granted Xcelera and Plenteous the right to appoint four directors each to the Mirror Image board of

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[2]Grandsen is a British corporation. Gillberg is an individual citizen of Sweden.

directors. Mirror AB retained the right to appoint one director. Finally, the parties agreed that any dispute, controversy or claim "arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration" in Sweden.[3]

The relationship among the parties deteriorated quickly after the stock offering closed. After gaining control of the corporation, Xcelera initiated a series of transactions that it claims were designed to benefit Mirror Image. The minority stockholders believe Xcelera has benefitted only itself. Viewing these transactions as part of a scheme to dilute their minority interest, Mirror AB formed a litigation construct, Parfi Holding AB, which proceeded, along with Plenteous, Grandsen, and Gillberg, to challenge Xcelera's actions.[4]

The first two undertakings that raised concern for Parfi occurred in April and July of 1999. The transactions involved subscriptions totaling over 13 thousand shares of Mirror Image stock, ostensibly intended to raise $7 million that Mirror Image required to continue operations. Mirror Image issued all of the stock to Xcelera, boosting Xcelera's holdings from 62.5% to 91.8% of the corporation's equity. Parfi alleges that the subscriptions were unnecessary and designed solely to allow Xcelera to strengthen its hold on Mirror Image by purchasing the stock at a price below fair market value. Xcelera allegedly did not provide the minority stockholders sufficient time to decide whether to subscribe and ignored attempts by other stockholders who attempted to exercise their right to participate in the subscriptions.

In the third transaction, Xcelera allegedly used its control of the Mirror Image board to arrange for a private placement of Convertible Preferred Stock (the "Convertible

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[3]Underwriting Agreement § 20.2.

[4]Plaintiffs will be referred to collectively as Parfi unless the analysis requires mentioning the specific parties by name.

Preferred Stock Offering" or "November Offering"). According to Parfi, the offering was designed to permit Xcelera to capitalize on the pending announcement that Hewlett-Packard would enter into a strategic alliance with Mirror Image. The strategic alliance involved a $32 million investment in the start-up by the computer giant. Parfi claims that the Convertible Preferred Offeringallowed Xcelera to purchase Mirror Image stock at a pre-announcement bargain price before the market received the information and improved its stock price.

In the fourth transaction Parfi contends that Xcelera usurped a corporate opportunity that rightfully belonged to Mirror Image. In March of 2000, Exodus Communications Inc. entered into an agreement to buy over 32 million shares of Mirror Image stock (the "Exodus Transaction").[5] In exchange, Mirror Image would receive $75 million in cash and over 3 million shares of Exodus stock. Xcelera arranged for Exodus to pay 75% of the consideration directly to Xcelera since it owned the vast majority of Mirror Image stock. Xcelera has allegedly exchanged at an enormous profit its diluted stock for cash and Exodus stock.

Xcelera has profited greatly from its investment in Mirror Image. The price of Xcelera stock rose from approximately $29 per share in July of 1999 to $190 per share by February of 2000. Believing Xcelera has reaped this gain at the expense of its fellow Mirror Image investors, Parfi has sought relief based on its dual legal relationship with Xcelera. Parfi has brought a contract claim against Xcelera as a fellow investor who made certain assurances in the Underwriting Agreement. Separately, Parfi asserts that, as a controlling stockholder, Xcelera has breached fiduciary duties owed to Parfi under Delaware corporation law.

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[5]By this time, Mirror Image had initiated two stock splits which increased the number of authorized shares to 96 million.

Arbitration Proceedings in Sweden

Abiding by the terms of the Underwriting Agreement, Parfi submitted its breach of contract claims to arbitration in Sweden. The contract claims Parfi presented at arbitration did not involve a breach of any specific provision of the Underwriting Agreement. Parfi sought to prove that Xcelera led its fellow underwriters to rely on certain assumptions that induced them to enter into the contract. According to Parfi, Xcelera assured its fellow underwriters that the Agreement provided only an interim solution to Mirror Image's financing problem and that Xcelera would, on behalf of the other investors, arrange for subsequent stock offerings at a much higher price. Xcelera, Parfi claimed, promised to use its controlling interest only to raise additional capital at a favorable rate of return and assured Parfi that the controlling interest would not be used to dilute its investment. Plenteous also submitted to the arbitrators an e-mail in which a Xcelera board member promised that Xcelera would seek Plenteous' consent before Mirror Image took any "corporate action." Parfi and Plenteous argued that Xcelera's conduct amounted to a failure of these assumptions which invalidated the Agreement and entitled the investors to damages for the resulting dilution of their investment.

Parfi did not base any of its arbitration claims on its status as a stockholder of Mirror Image. The arbitrators' decision specifically noted that:

> Various corporate actions in [Mirror Image] after the Underwriting Agreement, undertaken under the laws of the State of Delaware, are presently subject to litigation before the courts of that State.... The claimants have ... not based their case in the present arbitration on or presented evidence regarding Delaware law. Also, they have not

invoked the duties ... of Xcelera as majority shareholder....[6]

The Arbitration Tribunal issued its decision on September 26, 2001. Parfi and Plenteous could not convince the Tribunal that Xcelera entered into the Underwriting Agreement with an intent to dilute the interests of the other investors. The Tribunal held that the Agreement was meant to provide a short-term investment in capital, and any long-term plan to secure financing was not a basic assumption upon which the Agreement was based.[7] The Tribunal awarded damages to Plenteous, however, because the arbitrators found that Plenteous' participation in the Agreement was based on Xcelera's assurance that it would seek Plenteous' consent before engaging Mirror Image in any "corporate action."[8] The Tribunal determined that the April and July subscriptions were "corporate actions," and the Tribunal awarded Plenteous damages for any resulting dilution in their interest in Mirror Image.[9]

Proceedings in the Court of Chancery

In November of 2000, a few months after submitting its contract claims to arbitration, Parfi filed an action in the Court of Chancery alleging that Xcelera breached fiduciary duties it owed to Mirror Image stockholders. Parfi alleged various claims of fraud, conspiracy, implied contract and misappropriation of a corporate opportunity against Xcelera and the Xcelera directors who sit on the Mirror Image board.

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[6]Arb. Award at 25.

[7]*Id.* at 26.

[8]*Id.* at 28, 31.

[9]*Id.*

Xcelera responded with motions to dismiss based on lack of personal jurisdiction and failure to submit the fiduciary duty claims to mandatory arbitration as provided in the Underwriting Agreement. The Court of Chancery granted Xcelera's motion for summary judgment and dismissed Parfi's claims, holding that the broad arbitration clause in the Underwriting Agreement required Parfi to submit for arbitration all claims related to the series of transactions that were challenged in Sweden.[10] With respect to the central issue, the court held that the fiduciary duty claims were "in connection with" the Underwriting Agreement and were, therefore, mandatorily arbitrable thereunder.

In the alternative, the Vice Chancellor (1) dismissed Xcelera's motion to dismiss all counts against it for lack of personal jurisdiction; (2) denied Mirror Image's motion to dismiss plaintiffs' derivative claims; (3) granted defendants' motions to dismiss the fraud claims as well as the claims against the director defendants for aiding and abetting fraud for failure to state a claim upon which relief may be granted; (4) required the complaint be amended to change the derivative constructive fraud claims into counts for breach of fiduciary duty; (5) granted defendants' motions to dismiss the civil conspiracy claims; and (6) granted the defendants' motions to dismiss plaintiffs' breach of contract claim against Xcelera, as well as their motion to dismiss plaintiffs' tortious interference with contract claim against the director defendants.[11]

Issues on Appeal

Parfi claims the Court of Chancery erred: (1) by dismissing its fiduciary duty claims as subject to arbitration

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[10] *Parfi Holding AB v. Mirror Image Internet, Inc.*, ("Parfi S.J. Op."), Del.Ch., C.A. No. 18507, 794 A.2d 1211, 1215 (2001).

[11] *Id.* at 1215. These alternative decisions were predicated on the possibility that court's decision on arbitrability might not prevail.

because of the "arising out of or in connection with" language of the Underwriting Agreement; (2) by finding that two of the plaintiffs, Grandsen and Gillberg, were bound by the arbitration clause even though they did not sign the Agreement; and (3) by finding that the individual director defendants could seek the benefit of the arbitration clause even though they did not sign the Underwriting Agreement.[12] Accordingly, Parfi asks this Court to reverse the trial court's judgment and permit plaintiffs to proceed with their claims in the Court of Chancery. We need to reach only the first issue on appeal to resolve the matter before us.

The Underwriting Agreement Does Not Require Parfi and Plenteous to Submit Their Fiduciary Duty Claims to Arbitration

This Court reviews de novo the Court of Chancery's interpretation of the Underwriting Agreement[13] as well as the application of relevant law.[14]

Parfi argues that the fiduciary duty claims it filed in the Court of Chancery were not "in connection with" the Underwriting Agreement and, therefore, these claims fall outside the mandatory arbitration provided for in Section 20.2 of the contract. Xcelera rests its counter-argument on the Vice Chancellor's interpretation of the arbitration clause as an obligation so broad in scope that it required Parfi to assert its fiduciary duty claims along with its contract claims.

When the arbitrability of a claim is disputed, the court is faced with two issues. First, the court must determine whether the arbitration clause is broad or narrow in scope. Second, the court must apply the relevant scope of

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[12]The balance of the Vice Chancellor's decision has not been appealed and is not addressed by this Court.

[13]*Shock v. Nash*, 732 A.2d 217, 224 (Del.1999).

[14]*Rapid-American Corp. v. Harris*, 603 A.2d 796, 804 (Del.1992).

the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration. If the court is evaluating a narrow arbitration clause, it will ask if the cause of action pursued in court directly relates to a right in the contract. If the arbitration clause is broad in scope, the court will defer to arbitration on any issues that touch on contract rights or contract performance. This is a case of first impression in Delaware.[15]

The Arbitration Clause in the Underwriting Agreement Establishes a Broad Scope

The parties do not dispute that Section 20.2 of the Underwriting Agreement has a broad scope. By agreeing to submit to arbitration "any dispute, controversy, or claim arising out of or in connection with" the Underwriting Agreement, Xcelera, Mirror AB, and Plenteous have signaled an intent to arbitrate all possible claims that touch on the rights set forth in their contract.[16] The issue is whether the arbitrable contract claims are connected to the

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[15]While Parfi's appeal presents this Court's first opportunity to articulate the approach for determining the arbitrabililty of claims, we note that courts in several other jurisdictions employ a similar inquiry. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 723 F.2d 155, 159 (1st Cir.1983), aff'd in part rev'd in part, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224 (2d Cir.2001); *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir.1996); *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir.1998) (interpreting Texas law); In re Oil Spill by Amoco Cadiz, 659 F.2d 789, 794 (7th Cir.1981); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir.1999); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1515-16 (10th Cir.1995); *Armada Coal Export, Inc. v. Interbulk, Ltd.*, 726 F.2d 1566, 1568 (11th Cir.1984); *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla.1999).

[16]*See Elf Atochem N. America v. Jaffari Inc.*, 727 A.2d 286, 295 (Del.1999) (holding that "in connection with" creates an obligation to submit claims related to the agreement to arbitration).

fiduciary duty claims that are independently grounded on Delaware corporation law.

The Fiduciary Duty Claims Are Beyond the Scope of the Arbitration Clause

The Vice Chancellor applied the arbitration clause to the fiduciary duty claims because he read the contract term to require "the resolution of claims related to a common set of underlying facts in a single forum." [17] We disagree with this interpretation of what Mirror AB, Plenteous, and Xcelera intended to provide for in their contract. The issue is whether the fiduciary duty claims implicate any of the rights and obligations provided for in the Underwriting Agreement. Stated differently, do the fiduciary duty claims depend on the existence of the Underwriting Agreement?

When parties to an agreement decide that they will submit their claims to arbitration, Delaware courts strive to honor the reasonable expectations of the parties and ordinarily resolve any doubt as to arbitrability in favor of arbitration.[18] Nevertheless, arbitration is a mechanism of dispute resolution created by contract.[19] An arbitration clause, no matter how broadly construed, can extend only so far as the series of obligations set forward in the underlying

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[17] *Parfi S.J. Op.*, 794 A.2d at 1226.

[18] *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del.1998).

[19] *See id.* at 761 (stating that "A court will not compel a party to arbitrate ... absent a clear expression of such an intent").

agreement.[20] Thus, arbitration clauses should be applied only to claims that bear on the duties and obligations under the Agreement.[21] The policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation.

When Xcelera, Mirror AB, and Plenteous agreed to the arbitration provision in the Underwriting Agreement they did not commit to bring into arbitration every possible breach of duty that could occur between the parties.[22] The arbitration clause signals only an intent to arbitrate matters that touch on the rights and performance related to the contract.[23] The term "arising out of or in connection with" must be considered in that light. The Court of Chancery should have concentrated on the

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[20]*See* Coors, 51 F.3d at 1516 ("A dispute within the scope of the contract is still a condition precedent to ... involuntary arbitration") (citation omitted); *see also NYLCare Health Plans*, 141 F.3d at 250 (stating that a claim "is arbitrable if it is 'so interwoven with the contract that it could not stand alone, but is not arbitrable if it is completely independent of the contract and could be maintained without reference to a contract' ") (quoting *X.L. Ins. Co. Ltd v. Harford Accident & Indem. Co.*, 918 S.W.2d 687, 689 (Tex.App.1996)).

[21]*Elf Atochem*, 727 A.2d at 295 (upholding trial court's determination that contract claims must be submitted to arbitration because they "bear directly" on the duties and obligations under the agreement).

[22]The United States Court of Appeals for the Tenth Circuit provides a simple illustration of this principle: "[i]f two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract.... it is simply fortuitous that the parties happened to have a contractual relationship." *Coors*, 51 F.3d at 1516.

[23]*See, e.g., Blystad*, 252 F.3d at 224 (stating that broad arbitration clauses create a presumption of arbitrability for collateral matters which implicate "issues of contract construction or the parties' rights and obligations under it") (citation omitted); *American Recovery*, 96 F.3d at 93 (agreement must "encompass the dispute" to require arbitration).

similarity of the separate *rights* pursued by plaintiffs under both the contract and the independent fiduciary duties rather than the similarity of the *conduct* that led to potential claims for both the contract and fiduciary breaches of duty.[24]

Parfi can maintain an action based on the alleged breaches of the independent set of fiduciary duties that Xcelera owes Mirror Image stockholders even though the claims arise from some or all of the same facts that relate to the transactions that provided the basis for its contract claims.[25] Xcelera's fiduciary duties to Mirror Image consist of a set of rights and obligations that are independent of any

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[24]Generally, purportedly independent actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract. Thus, a physician can bring a class action suit on behalf of patients against an HMO for false advertising claims even though the physician signed a contract to provide care to beneficiaries under the HMO. *NYLcare Health Plans,* 141 F.3d at 250-52. Although the physician may rely on information disclosed to him through his agreement with the HMO, the obligations under the contract are not related to the separate duties the HMO owed potential patients under tort law. *Id.* at 251-52. Similarly, a brewing company could not be forced to submit to mandatory arbitration when it brings an antitrust claim against another brewing company simply because they are involved in a licensing agreement. *Coors,* 51 F.3d at 1515-1518. If the court applied the arbitration clause to a set of rights against unfair competition that existed outside the agreement, "*every brewer in America* except" the party to the contract could bring the antitrust action. *Id.* at 1516.

[25]*See Havens v. Attar,* 1997 WL 55957 (Del. Ch.) at *5 (holding that if an agreement is merely a "source of information that the Court may find useful in its analysis of the plaintiffs' claims" then the agreement does not require arbitration of the claim); *see also NYLcare Health Plans,* 141 F.3d at 251 ("The fact that the complaint specifically referred to, and related as a factual matter to, the contract containing the arbitration clause [is] ... irrelevant.") (analyzing *Fridl v. Cook,* 908 S.W.2d 507, 513 (Tex. App. 1995)).

contract[26] and need be submitted to arbitration only if the claims based on fiduciary duties touch on the obligations created in the Underwriting Agreement.[27] If the Underwriting Agreement does not implicate Xcelera's fiduciary duties, the arbitration clause cannot bar Parfi from seeking the relief every other stockholder is entitled to under Delaware law.

The Vice Chancellor painstakingly parsed the contractual language requiring that claims "arising out of or in connection with" the Underwriting Agreement must be submitted to arbitration.[28] He properly held that the fiduciary duty claims do not "arise out of the" Agreement. But he concluded, we believe erroneously, that these claims are "in connection with" the Agreement. In our view, this latter conclusion gives a far too expansive a meaning to the word "connection." We conclude that the analysis must turn on the issue of whether the fiduciary duty claims would be assertable had there been no Underwriting Agreement. We hold that they would be independently and separately assertable in that situation and are therefore not "in connection with" the Agreement.

The Underwriting Agreement does not establish rights and obligations extensive enough to encompass the dispute Parfi has brought in the Court of Chancery. The

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[26] *See* BALOTTI & FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS, Forward (2002) ("In corporations, the basic contract among stockholders is contained in the certificate of incorporation and to some extent the by-laws").

[27] *Compare American Recovery*, 96 F.3d at 94 (requiring arbitration of a corporate opportunity claim because the duty of loyalty breach was based upon a business expectancy created by the underlying agreement), *with Havens* at *1, *5 (holding that a corporate opportunity does not fall under the arbitration clause of a voting agreement because the claim involved usurpation of a business prospect that did not "turn on" a contract that merely governs voting rights and dividend distributions among stockholders).

[28] *Parfi S.J. Op.*, 794 A.2d at 1227.

purpose of this Underwriting Agreement, like similar underwriting agreements, was to "negotiate the amount of capital that the company [sought] ... to raise, the type of security to be issued, the price and any special features of the security, and the underwriter's compensation."[29] The Agreement set out the typical warranties related to compliance with securities laws and other regulations. In addition, Mirror Image bargained for maintaining one seat on the board of directors, and both Xcelera and Plenteous were entitled to appoint four directors each. The performance of the Agreement, by its terms, was scheduled to conclude on the closing date, when the underwriters and the company committed to a schedule for issuing the securities and paying the stated price per share.[30]

Reviewing the provisions of the Agreement, Xcelera cannot point to any contract term that creates a species of obligation upon which Parfi can base a breach of fiduciary duty claim. The Tribunal evaluating the Agreement noted that:

> In the understanding of the Tribunal, the distinction between fair and unfair dilution can absent express agreement be drawn only with reference to applicable company law. It can be said that any agreement resulting in some *lasting* relation between the parties thereto is premised on the assumption that the other party or parties will in the future behave within the limits of the law. Such assumption does not, however, trigger legal remedies different from those which follow from the application of the relevant law.... it is accordingly for the Courts of the State of

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[29]*MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 216 F.Supp.2d 251, 253 (S.D.N.Y.).

[30]Underwriting Agreement § § 1.1, 4.1-4.4.

Delaware to determine whether there was "unfair" dilution .... [31]

The Tribunal has interpreted the Underwriting Agreement to fall short of imposing any continuing duty on the part of Xcelera to safeguard the minority stockholders' investment against dilution. The purported dilution rests on an alleged breach of duty that is more "lasting" than the short-lived obligations bargained for in the Underwriting Agreement. The fiduciary duties Xcelera owes Parfi are beyond the contract and rest on an independent set of rights provided for in the Delaware corporation law.

Even though we have determined that fiduciary duty claims lay outside the scope of the Underwriting Agreement, we have nevertheless given the arbitration clause its full effect. The Vice Chancellor incorrectly assumed that "if other claims based on the same conduct that is also alleged to be a breach of ... the Agreement are not 'in connection with' a breach or the invalidity of the Agreement," then no other non-contract claims could be "so 'connected.' "[32] The court need only look to the Tribunal's decision to see that the arbitrators relied upon claims arising "in connection with" the Underwriting Agreement to award Plenteous damages. The Tribunal found that Xcelera breached an obligation to obtain Plenteous' consent before it entered into the stock subscriptions. The consent obligation was a collateral agreement between Plenteous and Xcelera that did not "arise" from the rights in the Underwriting Agreement. The Tribunal noted that collateral agreement "was ... no part of the Underwriting Agreement ... but a separate promise from one of the underwriters to another."[33] The side agreement between the underwriters could have

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[31] Arb. Award at 29 (emphasis supplied).

[32] *Parfi S.J. Op.* at 1227.

[33] Arb. Award at 30.

been arbitrated only because the obligation arose "in connection with" the Agreement.

By comparing the side agreement between the underwriters with the fiduciary duty claim, obvious differences in the scope and the nature of the obligations prove that the side agreement is a collateral matter to the Underwriting Agreement while the unfair dilution claims and the corporate opportunity claims are not. The side agreement was confined to only two parties, Xcelera and Plenteous.[34] Xcelera's fiduciary duties as a controlling stockholder, by contrast, are owed to all Mirror Image stockholders.[35] Plenteous cannot claim a right to consent unless it bargained for such a right. The right to protection against a controlling stockholder, however, applies automatically when a party becomes a Mirror Image stockholder.[36] The consent Plenteous bargained for was confined to "corporate actions" taken by Xcelera through Mirror Image.[37] An unfair dilution claim and corporate opportunity claim would encompass all transactions

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[34]The Tribunal denied Mirror AB the benefit of Plenteous' right to consent because Mirror AB did not know about the e-mail. Since "the promise in the e-mail was not given to Mirror AB, this company cannot obtain damages on this ground." Arb. Award at 31.

[35]*Kahn v. Lynch Communication Sys. Inc.*, 638 A.2d 1110, 1114 (Del.1994) (holding that a stockholder who owns a majority interest in or exercises control over the business affairs of the corporation owes fiduciary duties to its fellow stockholders).

[36]*See id.; see also* Del. Ch. R. Pr. 23.1 (plaintiff may initiate a derivative action if the plaintiff was a stockholder of the corporation at the time of the transaction complained of or if the plaintiff's interest in the corporation "devolved on the plaintiff by operation of law").

[37]The Tribunal held that the definition of "corporate action" only reached the stock subscriptions. The November Offering and the Exodus Transaction did not fall within the side agreement because Plenteous could not demonstrate that those transactions "fall under the concept of corporate action between" Xcelera and Mirror Image. Arb. Award at 32.

initiated by Xcelera that prove a breach of Xcelera's fiduciary duty.[38]

Applying the arbitration clause to bar Parfi's action would lead to an absurd outcome: every stockholder except Parfi could bring the unfair dilution claim. The Vice Chancellor acknowledged this result but concluded that Parfi chose its predicament by basing a contract claim on the conduct that could have provided a stronger fiduciary duty claim.[39] We disagree because the mandatory arbitration clause in the Agreement applies only to the rights relating to the initial offering of Mirror Image stock. The parties likely did not intend the provision to act as a bar to litigation over a set of rights and remedies that lay outside the scope of the Agreement itself.

The Vice Chancellor correctly engaged in an analysis to scrutinize causes of action carefully to search out artfully pleaded claims that attempt to avoid the arbitration clause to which the plaintiffs have agreed.[40] But plaintiffs must split different claims that arise from the same transaction if some of those claims are based on rights that cannot be adjudicated by an arbitrator, like the Tribunal here, who can grant relief based only on the limited set of duties created by

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[38]A stockholder may bring a corporate opportunity claim, for example, by alleging that a fiduciary has saved for himself an opportunity in which the corporation has an expectancy, that is in the corporation's line of business, and is a prospect that the corporation is financially able to exploit. *See Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del.1996). The fiduciary need not act through the company to breach his duty of loyalty.

[39]*Parfi S.J. Op.* 794 A.2d at 1228.

[40]*See Elf Atochem*, 727 A.2d at 296 (noting plaintiffs cannot couch their contract claims as derivative actions to avoid their obligation to arbitrate disputes related to the agreement).

a particular agreement.[41] While some agreements, by their nature, extend so far as to mandate arbitration for breach of fiduciary duty claims,[42] the Underwriting Agreement here did not. The right to vindicate breaches of fiduciary duty inflicted by a majority stockholder on the minority is a central doctrine of Delaware law.[43] Absent a clear expression of an intent to arbitrate breach of fiduciary duty claims, Parfi has the right to have the merits of those claims adjudicated by the Court of Chancery.[44]

Conclusion

We reverse the judgment of the Court of Chancery dismissing the complaint and we remand to the court for proceedings consistent with this opinion.

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[41] *Cf. Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (rejecting notion that judicial economy requires a court to hear an arbitrable claim when another claim is non-arbitrable). Courts commonly split arbitrable claims from non-arbitrable claims. *See, e.g., Mediterranean Enterprises Inc. v. Ssangyong Corp.,* 708 F.2d 1458, 1464 (9th Cir.1983); *Gregory v. Electro- Mechanical Corp.,* 83 F.3d 382, 385 (11th Cir.1996); *American Recovery,* 96 F.3d at 91.

[42] *See, e.g., Elf Atochem,* 727 A.2d at 288, 293-95 (requiring parties to submit purported fiduciary duty claims to arbitration since the series of agreements created a system setting forward the governance and operation of the parties' joint venture).

[43] *See, e.g., Sterling v. Mayflower Hotel Corp.,* 93 A.2d 107, 109-10 (Del.1952) (noting that, as a "settled rule of law," a majority stockholder stands in the position of a fiduciary in relation to the property of the minority stockholders).

[44] *See, e.g., DMS Properties-First v. Scott Associates,* 748 A.2d 389, 391 (Del.2000) ("A party cannot be forced to arbitrate the merits of a dispute ... in the absence of a clear expression of such intent in a valid agreement."). We need not decide whether or to what extent a properly drafted agreement can compel arbitration of fiduciary duty claims, as that issue is not before us, and we decide only the case before us. *See Paramount Communications, Inc. v. QVC Network, Inc.,* 637 A.2d 34, 51 (Del.1993).

IN THE COURT OF CHANCERY OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PARFI HOLDING AB,	)	
GUNNAR GILLBERG,	)	
PLENTEOUS CORP. and	)	
GRANDSEN, LTD.,	)	
Plaintiffs,	)	
	)	
v.	)	Civil. Action.
	)	No. 18507
	)	
MIRROR IMAGE INTERNET, INC.,	)	
XCELERA.COM, INC.,	)	
ALEXANDER M. VIK,	)	
GUSTAV VIK and	)	
HANS MAGNUS FAJERSON,	)	
Defendants.	)	

MEMORANDUM OPINION
Submitted: Dec. 6, 2001
Decided: Dec. 20, 2001
Filed: December 20, 2001

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STRINE, Vice Chancellor

Plaintiffs, minority shareholders of defendant Mirror Image Internet, Inc. ("Mirror Image"), have brought an action challenging a series of transactions (the "Challenged Transactions") involving defendants Mirror Image, its majority shareholder, Xcelera.com, Inc. ("Xcelera"), and three individuals who serve on the board of directors of both Xcelera and Mirror Image (the "Director Defendants"). In addition to asserting a litany of claims based upon each Transaction, plaintiffs have argued that the sum total of the claims demonstrate a coherent strategy and "course of conduct" by defendants to illegally and fraudulently dilute the plaintiffs' ownership interests in Mirror Image.

Specifically, the plaintiffs allege that the Director Defendants — who comprised a majority of the Mirror Image board — caused Mirror Image to issue stock to Xcelera at below fair market value, and did not permit the minority stockholders to participate in those subscriptions. As a result, Xcelera increased its control of Mirror Image at an unfair cost. nce Xcelera had consolidated its ownership and diluted the minority, plaintiffs contend, the Director Defendants caused Mirror Image to engage in other transactions to benefit Xcelera at the expense of Mirror Image.

Basing their claims in part upon this alleged scheme, plaintiffs have asserted twelve individual claims against various combinations of defendants — including counts of breach of fiduciary duty, fraud, civil conspiracy, breach of contract, and interference with contract. Further, three counts of constructive fraud and a count for misappropriation of corporate opportunity have been asserted as derivative claims.

In response, defendants (in various combinations) have launched a voluminous multi-pronged assault on plaintiffs' allegations in the form of three concurrent motions to dismiss.[1] In this opinion, I address each of these defendants' motions. In so doing, I hereby:

(1) Grant summary judgment on the defendants' motion to dismiss the complaint because all the counts are subject to a mandatory arbitration provision;

(2) In the alternative:

(a) Deny Xcelera's motion to dismiss all counts against it for lack of personal jurisdiction;

(b) Deny Mirror Image's motion to dismiss plaintiffs' derivative claims (Counts IV, IX, XIV, and XV) for failure to meet the requirements of Delaware Court of Chancery Rule 23.1;

(c) Grant all defendants' motions to dismiss the fraud claims (Counts III, VIII, and XIII) as well as the claims against the Director Defendants for aiding and abetting such fraud (within Counts III, VIII, and XIII), for failure to state a claim upon which relief may be granted under Delaware Court of Chancery Rule 12(b)(6);

(d) Require that the complaint be amended to change the derivative constructive fraud claims (Counts IV, IX, and XIV) into counts for breach of fiduciary duty;

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[1]That is, separate briefs were filed by each of Xcelera and the Director Defendants, Xcelera, and Mirror Image.

(e) Grant the defendants' motions to dismiss the civil conspiracy claims against all defendants (Counts V and X); and

(f) Grant the defendants' motion to dismiss plaintiffs' breach of contract claim against Xcelera (Count XI), as well as their motion to dismiss plaintiffs' tortious interference with contract claim against the Director Defendants (Count XII).

I. The Parties[2]

Plaintiff Parfi Holding, AB ("Parfi"), a Swedish corporation, is the successor-in-interest to Mirror Image AB ("Mirror AB"), now known as Drax Holding AB. During the events which gave rise to this litigation, Mirror AB was the parent corporation of Mirror Image. Parfi is a corporation formed to represent the stockholders of Mirror AB in pursuing relief against Xcelera and the Director Defendants. Parfi thus stands in the shoes of Mirror AB for purposes of this litigation.

The other Mirror Image minority shareholders alleging harm are plaintiffs Plenteous Corp. ("Plenteous"), a Panamanian corporation; Grandsen, Ltd. ("Grandsen"), a company based in and formed under the laws of Great Britain; and Gunnar Gillberg, a natural person and citizen of Sweden. Each of these plaintiffs has participated with Parfi in pressing these claims and certain claims in arbitration; indeed, Grandsen and Gillberg are party to a formal contract with Parfi to share in the costs and benefits of

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[2]For the most part, the facts in this opinion are all drawn from the complaint or the numerous exhibits thereto. All reasonable inferences are drawn in favor of the plaintiffs. In Section II(A), I treat the defendants' motion as one for summary judgment and rely on other evidence, which I have also construed in the plaintiffs' favor.

litigation.[3] For that reason and reasons of verbal economy, I hereafter refer to the plaintiffs as Parfi, except where a more precise distinction is necessary.

Defendant Xcelera.com, Inc., formerly "The Scandinavia Company" and now known simply as "Xcelera Inc.," is a holding company incorporated and with a principal place of business in the Cayman Islands, British West Indies. Xcelera became the majority shareholder of Mirror Image in 1999. At the time of the events giving rise to this dispute, Xcelera's principal asset was its controlling stake in the Delaware corporation, Mirror Image.[4]

Defendant Mirror Image, a Delaware corporation with a principal place of business in Massachusetts, is an Internet infrastructure company that has developed technology to speed access to popular Web sites. Mirror Image was formed as a Delaware subsidiary of Sweden-based Mirror AB in May 1997.

Defendants Alexander M. Vik, his brother Gustav M. Vik, and Hans Magnus Fajerson (collectively, the aforementioned "Director Defendants") have been, at all relevant times, members of the boards of both Xcelera and Mirror Image.[5] It is alleged that the Vik brothers own Xcelera through Vik Brothers International.

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[3]*See, e.g.*, Dep. of Sverker Lindbo at 60.

[4]At one point, Xcelera also owned a resort hotel in the Canary Islands, Spain.

[5]According to the complaint, Sverker Lindbo and Tryggwe Karlsten also served on Mirror Image's board of directors at certain times relevant to this action. Lindbo was the founder, president, and CEO of Mirror AB, and, as discussed next, also served as president and CEO of Mirror Image. Neither of these individuals is a party to this action.

II. Factual Background

A. Xcelera Obtains a Controlling Interest In Mirror Image Through the Underwriting Agreement

In May 1997, Mirror AB incorporated Mirror Image in Delaware. Headed by Sverker Lindbo, who served as Mirror Image's president and chief executive officer, the Massachusetts-based subsidiary was engaged in developing technology to speed access to information on the Internet. Mirror Image's original certificate of incorporation authorized 16,000 shares of common stock; at its inception, however, only 1,000 shares were issued. They were all held by Mirror AB.

In its formative years, Mirror Image struggled to gain access to capital. By January 1999, despite repeated infusions from Mirror AB totaling $10 million, Mirror Image was unable even to meet its short-term obligations. Indeed, in order to cover the company's immediate payroll needs, certain of the Mirror AB shareholders agreed to lend $75,000 to Mirror Image in early 1999.

In March 1999, in a further effort to fund its short-term operations, Mirror AB entered into an agreement (the "Underwriting Agreement" or "Agreement") with Xcelera and Plenteous to raise $2 million. That money, ostensibly, would keep Mirror Image afloat until June; in the meantime, Mirror Image was supposed to develop a business plan to solicit new financing by the time that $2 million ran out.

Under the Agreement, Mirror Image issued 3,876 new shares at $516 per share. The lion's share of the $2 million investment, $1.75 million, came from Xcelera. In return, Xcelera became the controlling shareholder of Mirror Image, and was guaranteed *at least* 2,626 of Mirror Image's 5,167 shares once the entire subscription was funded.[6] In addition, Xcelera and Plenteous were granted the right to appoint four directors to the Mirror Image board. Mirror

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[6]Underwriting Agreement, § 7.3.

AB was expressly given the right to appoint one director.[7] Xcelera and Plenteous appointed Alexander Vik, Gustav Vik, Fajerson, and Tryggwe Karlsten. Mirror AB appointed Lindbo, who remained president and CEO.

In addition, in language that would prove portentous in the disputes to come, the Agreement provided that any dispute, controversy or claim "*arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration*" in Sweden.[8]

The Underwriting Agreement was consummated on March 29, 1999. Because its various terms and the ownership interests it created are rather confusing, it makes sense at this stage to summarize the Agreement's terms. They are as follows:

- Xcelera received 3,392 shares for its $1.75 million investment. Plenteous, which invested $250,000, received 484 shares.

- Under § 7.3 of the Agreement, certain individuals with large ownership interests in Mirror AB were given an opportunity to purchase Mirror Image shares. It is under this provision that plaintiffs Gillberg and Grandsen, Ltd. entered the picture; Gillberg subscribed to 100 shares, while Grandsen purchased 41. Under § 7.3, these shares--up to 875 of them--would be issued *pro rata* from Xcelera's and Plenteous's shares of the subscription (*e.g.*, in a seven-eighths to one-eighth ratio, respectively). As it turned out, options were only exercised on 185 of these 875 shares.

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[7]*Id.* § 4.2(b)(i). Mirror AB's right to appoint one board member was contingent upon Xcelera and Plenteous collectively owning a majority of Mirror Image's issued shares.

[8]*Id.* § 20.2 (emphasis added).

- The $75,000 loan by the Mirror AB shareholders to Mirror Image was converted into 291 shares of Mirror Image stock.

- The subscription was divided into three phases. First, at the closing of the Agreement on March 29, Xcelera and Plenteous were issued one-half of their allotted shares (1,696 and 242, respectively). Second, between March 29 and April 16, the major Mirror AB shareholders were given the opportunity to subscribe pursuant to § 7.3. Finally, after April 16, the remaining shares would be issued.

- Once the terms of the Agreement were fully implemented, the relative shareholder interests were as follows:

	Interest In Mirror Image	Number of Shares
(1)	Options to Purchase Mirror Image Shares Exercised by Mirror AB Shareholders (Including Gillberg and Grandsen, Ltd.)	185
(2)	Shares to Xcelera (minus 162 shares from (1), above)	3,230
(3)	Shares to Plenteous (minus 23 shares from (1), above)	461
(4)	Shares to Mirror AB Shareholders Pursuant to the $75,000 Loan	291
(5)	Original Shares Held By Mirror AB	1,000
Total Number Of Mirror Image Shares		**5,167**

B. The April 23 Special Shareholders' Meeting and April Subscription

Once Xcelera had control of the Mirror Image board and held a majority of its stock, Xcelera began to reap almost immediate benefits from its investment. Namely,

Xcelera's own shares increased in price from $4 per share to over $26 per share in the month following the closing of the Underwriting Agreement.[9] The complaint indicates that Xcelera was not content to own a mere majority of Mirror Image, but quickly set out to use its newly acquired majority control to dilute the other Mirror Image stockholders even further. The first step, Parfi contends, was to put the wheels in motion for another subscription.

On April 13, 1999, company secretary Steven Peri sent notice to holders of record for a special shareholders meeting, to be held on April 23, 1999. Despite knowing that a subscription would be voted upon at the meeting, the Vik brothers and Fajerson assertedly misled Lindbo into believing that the meeting was only to discuss generally Mirror Image's "future capitalization needs."[10] In turn, Lindbo apparently passed on this vague rationale to Peri, whose notice to stockholders unwittingly cast the purpose of the meeting in misleadingly vague terms. The goal of this vagueness, asserts Parfi, was to lull minority shareholders into not exercising their right to block the meeting by preventing a quorum.[11]

At any rate, the special shareholders' meeting was convened on April 23, 1999. A quorum was present.[12] Gustav Vik made a presentation asserting the need to raise additional capital, then unveiled a resolution to raise an additional $4 million for Mirror Image. Under the plan (the

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[9]Compl. ¶ 33.

[10]*Id.* ¶ 44.

[11]The Mirror Image by-laws require a 70% quorum for shareholder action.

[12]As of the record date, only a portion of the shares created under the Underwriting Agreement had been issued. Thus, the stockholders at that time were as follows: Xcelera, 1,696 shares; Mirror AB, 1,000 shares; Peri & Stewart, trustee for the Mirror AB shareholders whose loan was converted to Mirror Image stock, 291 shares; Plenteous Corp., 242 shares (not present). Compl. ¶ 37.

"April Subscription"), Mirror Image would issue an additional 7,752 shares at $516 per share. Though all minority shareholders present voted against the Subscription, the proposal was approved on the strength of Xcelera's majority.

Parfi asserts that Xcelera proposed and voted for the April Subscription on terms that were "unfair, unreasonable, unnecessary, and improper." [13] In particular, it alleges that:

- The Subscription price was below fair market value.
- The Subscription was so vague in its terms that it "failed to identify all shareholders who were entitled to subscribe to additional shares."[14]
- Demand for additional information regarding the April Subscription was purportedly refused.
- The harsh deadlines imposed by the Resolution made it practically impossible for minority shareholders to participate.
- Given, among other things, Xcelera's then-substantial market capitalization,[15] there was no legitimate business reason to raise additional capital for Mirror Image, an entity controlled by Xcelera. Plaintiffs suggest that the Director Defendants' flat assertion of the need for additional capital, without explanation or documentation, was mere cover for Xcelera's desire to dilute the minority shareholders.

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[13] *Id.* ¶ 58.

[14] *Id.* ¶ 50.

[15] At that time, Xcelera's market capitalization had reached $100 million as a result of a dizzying rise in its stock price. *Id.* ¶ 32.

In spite of the purported defects in the execution of the April Subscription, certain minority stockholders attempted to exercise their right to subscribe on April 30, 1999 — subject to their review of a Management Business Plan that was supposed to be forthcoming. This exercise was never recognized, and Xcelera subscribed to all 7,752 shares, increasing its ownership in Mirror Image to 86%. The relative ownership interest of the minority shareholders fell to 14%.

Meanwhile, back on April 19, Alexander Vik demanded the resignation of Lindbo as president of Mirror Image. The following day, Alexander Vik convened a board meeting at which Parfi asserts that he fraudulently reported Lindbo wished to resign from the board. Lindbo was supposedly never notified of the meeting, nor did he ever express his desire to resign from the board. Allegedly based on the defendants' malfeasance, Lindbo did eventually resign as CEO, but not director, in May 1999.

C. The July Subscription and Stock Splits

The Director Defendants initiated yet another subscription in July, 1999 (the "July Subscription"). Allegedly without providing the minority stockholders with any information showing the necessity of further capital — or even showing whether the previous subscriptions had been fully funded — Gustav Vik, now Mirror Image's secretary, called a shareholders' meeting at which a $3 million subscription was proposed and adopted. Under this July Subscription, an additional 5,814 shares of common stock were to be issued, again at $516 per share.

Mirror Image issued all 5,814 shares to Xcelera. Parfi's claims regarding the July Subscription are similar to those under the April Subscription, namely, that the stock

was issued at significantly below market value;[16] that the minority shareholders were not given adequate time to decide whether to subscribe; and that Xcelera itself did not meet the payment schedule it was imposing on other shareholders. In addition, Parfi claims that because of a "first come, first served" provision in the July Subscription, the entire Transaction was a sham — that is, two days before the offer, Xcelera had already subscribed to all the shares allotted under the plan. Further, Parfi contends that the July Subscription placed the number of issued and outstanding shares at 16,980 — in excess of Mirror Image's authorized capital of 16,000 shares.

On September 3, 1999, Mirror Image filed an amendment to its certificate of incorporation in the office of the Delaware Secretary of State authorizing (albeit belatedly) the additional shares under the July Subscription. This amendment would be one of two such amendments filed in the Secretary of State's office pursuant to the Subscriptions. Once the July Subscription was completed, Xcelera had increased its ownership interest in Mirror Image to 91.8%.

Meanwhile, back on July 23, 1999, the Mirror Image board of directors had authorized a 2,000-for-1 stock split, increasing the authorized shares in Mirror Image from 16,000 to 32 million. Shortly thereafter, the board announced an additional 3-for-1 split, further increasing the authorized shares in the company to 96 million. The $516-per-share value set in the April and July Subscriptions translated to a post-split price of $0.09 per share.

Parfi further alleges that at the time Xcelera subscribed to the July Subscription at that price, it also issued stock options to employees with a post-split exercise

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[16]Parfi bases this allegation on the fact that Xcelera stock was trading at $29 per share as of July 21, 1999. In turn, it posits that since Xcelera's principal asset was its 86% ownership interest in Mirror Image, it must be true that "the value of the Mirror Image shares greatly exceeded the $516 per share assigned value." *Id.* ¶ 69.

price of $0.78 per share. It contends this $0.78-per- share price is an accurate indicator of the true value of Mirror Image stock, and uses it as evidence to suggest that July Subscription shares were sold to Xcelera at only a small fraction of their true value.[17]

D. The November 1999 Convertible Preferred Stock Offering

In the months that followed, Mirror Image was presented with enticing opportunities in the booming technology market. According to Parfi, Xcelera used its control of Mirror Image to divert those opportunities to itself, and to further dilute the minority stockholders.

In the fall of 1999, Alexander Vik was in the process of negotiating a strategic alliance for Mirror Image with Hewlett-Packard — negotiations that were not publicly disclosed. The plan was to exchange equity in Mirror Image for hardware and other infrastructure to allow Mirror Image to better deliver Internet service to its customers. Such a strategic alliance would, of course, appear to the financial markets to be an endorsement of Mirror Image by a "major player." In addition, Parfi alleges that Alexander Vik knew that a leading financial analyst was preparing a favorable report on Mirror Image technology.

Supposedly with the knowledge and belief that Xcelera's shares would rise upon eventual disclosure of this good news, the Director Defendants authorized a private placement of newly created Convertible Preferred Stock on November 30, 1999 (the "Convertible Preferred Stock Offering" or "Offering"). Allegedly, the deal was structured so that only Xcelera could participate — and so that Xcelera

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[17] *See id.* ¶ 72.

would not have to pay for its new shares until the pending strategic alliance was completed and publicly announced.[18]

Under the Offering, 23.5 million shares of new Series A preferred stock were released by Mirror Image to Xcelera at a post-split price of $2.13 per share. The Series A holders could, at their option, convert one Series A share for three shares of Mirror Image common stock, thus resulting in an implied common stock value of $0.71 per post-split share. To pave the way for the Offering, Mirror Image filed a second amendment to its certificate of incorporation in the office of the Delaware Secretary of State.

On December 21, 1999, Mirror Image announced publicly that Hewlett- Packard would make a $32 million investment in the company. Within two days of that announcement, Xcelera's stock price — presumably in recognition of its control over Mirror Image — soared from $67 per share to $160 per share.[19] Around this time, Xcelera allegedly paid the initial $8 million due under the Offering.

The good times continued to roll. In February 2000, with Xcelera stock hovering at around $130 per share, technology industry analyst George Gilder published his report touting Mirror Image's technology. By February 17, Xcelera's stock was trading at $190 per share. Parfi alleges that around this time, Xcelera used the proceeds from the Hewlett-Packard investment to meet its financial obligations

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[18]That is, under the Offering, 25% of the cost of the new shares came due on December 31, 1999, which was purportedly enough time for Vik to close and announce the strategic alliance. The remaining 75% came due on March 31, 2000. *Id.* ¶ 73.

[19]This assumption by Parfi further demonstrates its general approach to valuing Mirror Image stock for purposes of its complaint. Under the assumption that Xcelera's control of Mirror Image was Xcelera's principal if not singular asset, Parfi "pegged" the value of the Mirror Image shares to the Xcelera stock.

to purchase the Convertible Shares issued to it under the Offering.[20]

Parfi contends that there was no legitimate business reason for the Convertible Preferred Stock Offering, and suggests that its sole purpose was to financially benefit Xcelera. It also alleges that the effective common stock per-share price of $0.71 was again significantly less than fair market value.

E. The Exodus Transaction

The final Transaction in contest here occurred on March 22, 2000. On that date, Xcelera announced that it had forged a substantial deal with Exodus Communications, Inc. ("Exodus") whereby Exodus agreed to purchase 32,725,872 Mirror Image shares for a total value of $637.5 million, consisting of $75 million in cash and 3,758,268 shares of Exodus stock.

Parfi alleges that by its actions, Xcelera misappropriated the corporate opportunity belonging to Mirror Image. To wit, under the terms of the deal, only 25% of the cash and stock value from the Exodus deal was paid directly to Mirror Image. The remaining 75%, Parfi claims, was paid directly to Xcelera in exchange for Mirror Image shares "owned" by Xcelera. It further asserts that there was no legitimate business purpose for structuring the transaction in this way, other than to improperly benefit Xcelera at Mirror Image's expense by allowing Xcelera to sell equity it had recently bought too cheaply from Mirror Image to Exodus for an enormous profit.

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[20]While not pled with much precision in its complaint, Parfi presumably alleges that the increase in Xcelera's share price resulting from the Hewlett-Packard announcement provided Xcelera with the wherewithal it needed to meet its purchase obligations under the Offering.

III. Legal Analysis

Parfi has asserted myriad claims based upon the Challenged Transactions. Counts I-V of the complaint arise out of the April Subscription; the first two counts assert breaches of fiduciary duty against Xcelera (Count I) and the Director Defendants (Count II). Count III alleges fraud against all defendants, and further claims that the Director Defendants aided and abetted such fraud. Count IV, a derivative claim, asserts constructive fraud against all defendants, and also asserts an aiding and abetting claim against the Director Defendants. Count V alleges civil conspiracy against all defendants. Counts VI-X arise in connection with the July Subscription, and track the allegations of Counts I-V.[21]

Counts XI-XIV arise out of the November, 1999 Convertible Preferred Stock Offering. Parfi asserts that there existed an implied contract between Xcelera and the minority stockholders that all Mirror Image stock offerings would be made available to all shareholders on identical terms, and that Xcelera breached that contract (Count XI) by precluding the minority stockholders from participating in the Offering. Count XII alleges that the Director Defendants tortiously interfered with that implied contract. Count XIII asserts a fraud claim against all defendants in connection with the Offering, and further alleges that the Director Defendants aided and abetted the fraud perpetrated by Xcelera. Count XIV is a derivative claim for constructive fraud against all defendants.

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[21]In the complaint, Parfi's heading for Count IX alleges fraud. In the paragraph describing the allegation (¶ 152), however, it states that defendants "committed constructive fraud against Mirror Image." This statement, coupled with the facts that (1) Parfi already alleged fraud in Count VIII in connection with the July Subscription, and (2) Parfi asserted Count IX as a derivative complaint, lead me to conclude that Parfi meant to assert a "constructive fraud" claim in Count IX.

Count XV, a derivative claim, arises out of the Exodus Transaction. It alleges that all defendants misappropriated the Exodus opportunity for Xcelera to the detriment of Mirror Image.

Defendants, upon various grounds, have moved to dismiss all the counts. I now address each of the defendants' arguments.

A. Because the Challenged Transactions Are Arbitrable, The Complaint Must Be Dismissed In Its Entirety

The defendants first argue that this entire matter must be dismissed because all of Parfi's claims fall within the scope of the arbitration clause in the Underwriting Agreement. That clause is broadly written and states that "[a]ny dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of Stockholm Chamber of Commerce."[22]

The record relating to this aspect of the pending motions is voluminous and complicated. The following recitation attempts to boil down the pertinent undisputed facts, which largely come from exhibits all parties have relied upon as forming the basis for their arguments.[23] Despite the fact that the Underwriting Agreement is by its own terms governed by the substantive law of Sweden, all parties have argued this aspect of this motion under the assumption that Delaware law governs the question of

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[22]Underwriting Agreement, § 20.2.

[23]I treat this motion as one for summary judgment, and will decide it on the basis of the undisputed facts arising from the exhibits submitted by the parties. Parfi and the defendants have both submitted portions of the arbitration record in support of their respective positions, and I can perceive no prejudice to considering the unambiguous aspects of these documents, given the parties' mutual consent and reliance upon them.

whether Parfi's claims are arbitrable. The parties have not presented any argument that the Underwriting Agreement would not be interpreted in accordance with its plain terms under Swedish law. In keeping with the parties' choice, I therefore apply the settled principles of Delaware law to determine whether Parfi's claims are arbitrable. If those claims are arbitrable, this case must be dismissed because Delaware law respects and enforces agreements to arbitrate.[24] Indeed, our law requires that doubts about the scope of an arbitration clause be resolved in favor of arbitration.[25]

In accordance with the arbitration clause, Parfi and Plenteous brought claims against Xcelera in Sweden alleging that Xcelera had breached the Underwriting Agreement and fraudulently induced the consummation of that Agreement. On September 26, 2001, the arbitration panel issued its decision, finding that Xcelera had breached its contractual obligations to Plenteous, but not to Parfi. A central part of that panel's ruling was that Plenteous had been assured that Mirror Image would not take corporate action without Plenteous's assent, and that Xcelera had caused Mirror Image to take action without Plenteous's approval in breach of that assurance. One of the actions Xcelera was found to have caused Mirror Image to take without Plenteous's consent was the April Subscription.

As important, Parfi alleged in the arbitration that the parties to the Underwriting Agreement understood that the initial investment of Xcelera under that contract would be sufficient to fund Mirror Image for a period of months, and that during those months Mirror Image would prepare a

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[24] *SBC Interactive, Inc. v. Corporate Media Partners*, Del.Supr., 714 A.2d 758, 761 (1998); *Elf Atochem N. Am., Inc. v. Jaffari*, Del.Supr., 727 A.2d 286, 295 (1999).

[25] *SBC Interactive*, 714 A.2d at 761.

business plan and seek outside venture capital funding.[26] Parfi further argued that it entered the Underwriting Agreement on the understanding that Xcelera would not use its majority control of Mirror Image to dilute the other stockholders. Consistent with this contention, Parfi asserted that the actions of Xcelera in effecting the April and July Subscriptions, the Convertible Preferred Stock Offering, and the Exodus Transaction breached its contractual expectations under the Underwriting Agreement.[27] Indeed,

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[26]Parfi argued the following:

> Should the Underwriting Agreement not be deemed invalid, it may be noted that the ownership balance stated in the Underwriting Agreement represented the balance under which the parties would co-operate to work against a more permanent venture capital financing of MII Inc. **Each party was entitled to keep his percentage, as regards ownership of MII Inc, until a more permanent venture capital financing was raised from outside. By disturbing this ownership balance without consent from the other parties, the Respondent committed a breach of contract that has rendered the Respondent liable to pay damages to the Claimants.**

Arb. Award at 11 (bold emphasis added).

[27]The record of Parfi's argument to the arbitration panel is replete with references to the fact that the Challenged Transactions breached its expectations under the Underwriting Agreement and/or were unfair. Under a section of the Arbitral Award entitled "Legal Arguments," the tribunal noted that Parfi had argued the following:

> It was deciding factors [sic] underlying the decision by the Claimants to execute the Underwriting Agreement: (i) ***that*** the Respondent had the intention to, and would indeed, act in accordance with the purposes underlying the Underwriting Agreement; *i.e.*, that the parties thereto would provide financing only as an interim solution that would enable Mirror Inc to complete a business plan that would be used to raise additional venture capital at more favorable valuations; ... (iv) ***that*** **the Respondent did not have the intention to,**

and would not indeed, use its future position as majority shareholder for purposes of diluting the percentage of shares owned by the Claimants, who would become minority shareholders of Mirror Inc, and for purposes of enforcing measures to such a diluting effect; (v) that the Respondent had the intention to, and would indeed, act in good faith as regards the economic interests of the minority shareholders;

* * *

Contrary to the deciding assumptions thus underlying the decision by the Claimants to execute the Underwriting Agreement, the respondent never had any of the intentions assumed by the Claimants and never behaved as assumed by the Claimants. At the time of the execution of the Underwriting Agreement, it was apparent for the Respondent that it did not have any of the intentions that were assumed by the Claimants, and that the Respondent would not comply with the future behaviour that was assumed by the Claimants. All the deciding assumptions, which were held by the Claimants, were thus incorrect (Sw."orikoga") at the time when the Underwriting Agreement was signed... **It is obvious that the Claimants would not have entered into the Underwriting Agreement, should they have known that the deciding assumptions were in fact wrong or should they have known that the deciding assumptions would fail.**

Arb. Award at 7-8 (bold emphasis added). With respect to the putative unfairness of the Challenged Transactions, note, for example, the following testimony of Sverker Lindbo in the arbitration proceeding:

Q: When the Underwriting Agreement was entered into, did Mirror AB assume that Xcelera did not intend to use its future position as a majority shareholder for purposes of diluting the minority shareholders...?

A: Yes.

Q: Can you explain why this is something very important to Mirror AB?

A: Well, we had been through a tough negotiation and we felt that this was sort of the big hit that we took, but from now on we would share in the value creation that was

Parfi argued that the Challenged Transactions were an integral part of a secret and pre-conceived plan by Xcelera to seize control of Mirror Image for itself, to dilute out the other stockholders, and extract the value of the corporation for itself.[28] The Underwriting Agreement was a critical and necessary step in putting Xcelera in a position to carry out this concealed plan, but the Challenged Transactions were the actual vehicle by which Xcelera benefited itself at the expense of the other stockholders in breach of its contractual obligations.[29]

> going to happen, and therefore we relied on... fair treatment by... the new majority.
>
> Q: Were these assumptions erroneous or incorrect in any way?
>
> A: As it turned out, yes.

Defs. Op. Sup. Br. In Further Sup. of Mot. To Dismiss, Ex. K.

[28]Parfi asserted as much in its Closing Statement to the Arbitrators. Then, it argued that:

> The main and outstanding question is if the Respondent intended to dilute the minority shareholders as a course of action when the Underwriting Agreement was executed, or if the Respondent intended to retain for itself the option as a course of action to dilute the minority shareholders, and thus if there was a scheme at the execution of the Underwriting Agreement to unfairly dilute the minority shareholders by means of the detour plan.

Joint Status Report Regarding Arbitration, Tab 14.

[29]The Arbitral Award again provides specific references to this argument. In the section of the Arbitral Award entitled "Liability," for example, the panel noted that Parfi had asserted the following:

> Each of the Claimants has suffered considerable damage, which has been caused by several main factors. *First*, the damages were made possible by the

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At the arbitration, Parfi presented evidence regarding all of those Transactions and their effect on the minority

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> execution of the Underwriting Agreement that entitled the Respondent to a majority holding of shares in MII [I]nc ... *Fifth*, **the damages were caused by the initiation of corporate action between Mirror Inc and the Respondent, and by all the relevant decisions made by the Respondent as controlling shareholder of MII [I]nc. Sixth, the damages were caused by the Respondent's subsequent subscription of shares, and the therein-inherent dilution of the Claimant's ownership percentage.** All these main factors contributed to the Claimants' damages, which consists of the economic loss pertaining to a significantly decreased percentage as to each Claimants' ownership of shares in MII [I]nc.
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> * * *
>
> **Should the Underwriting Agreement not be deemed invalid, and should strict liability not be deemed at hand, it is apparent that the promises given to Claimants on 22 March and 29 March 1999 were part of the Underwriting Agreement as an undertaking by the Respondent.** In such a case, it may be noted that the promises were given prior to the execution of the Underwriting Agreement — and this that the formal requirements for addends to the Underwriting Agreement were not in force at this particular time — and that all parties to the Underwriting Agreement obviously intended the promises to form part of the Underwriting Agreement. **The Respondent however neglected to comply with these promises, and committed this breach of contract by willful misconduct and with the intent to cause said damages to the Claimants.**

Arb. Award at 10-11 (bold emphasis added; italics in original). In addition, with respect to the Hewlett-Packard and Exodus transactions in particular, the tribunal noted Parfi's argument that

> Without legitimate business reasons Hewlett-Packard and Exodus Communication Inc. have subsequently been allowed to invest in MII Inc. and further dilute the minority shareholders. In its dealings with Exodus Communication Inc. Respondent structured the investment so as to retain for itself most of the investment and thereby leaving MII Inc. with only a small part of the badly needed new capital. *Id.* at 6.

stockholders of Mirror Image.[30] But because it had also filed suit here, Parfi simultaneously told the arbitration panel that it was not seeking to arbitrate the question of whether the April and July Subscriptions, the Convertible Preferred Stock Offering, and Exodus Transaction involved breaches of fiduciary duty under Delaware law by Xcelera, except insofar as Xcelera's alleged improprieties in effecting those Transactions bore on its breach of contract and fraudulent inducement claims.

Parfi's advocacy strategy appears to have persuaded the arbitration panel to avoid making any findings regarding whether the Challenged Transactions involved breaches of fiduciary duty under Delaware law. Thus, the panel stated:

> The Claimants have... not based their case in the present arbitration on or presented evidence regarding Delaware law. Also, they have not invoked the duties and obligations of Xcelera as majority shareholder towards the minority in MII Inc. *They have also not asked the Tribunal to consider the legal effects of the corporate actions in MII Inc. after the Underwriting Agreement* (including the disputed share issues in April and July 1999 to which the Tribunal will revert in the following) *except insofar as such actions may have relevance for the validity of the Underwriting Agreement or give rise to damages*

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[30]As the defendants have pointed out in a side-by-side comparison of Parfi's arbitration demand and its complaint in this case, the factual overlap between the arguments presented to the Swedish arbitration panel and this court is extensive. *See* Ex. C of Op. Br. of Xcelera and Director Defendants' Mot. to Dismiss. It is far, far harder to find factual contentions that do not overlap than it is to identify those made in both forums.

for breach of the Underwriting Agreement and undertakings ancillary thereto.[31]

In keeping with this statement, Parfi argues that the claims it has asserted in this case regarding the Challenged Transactions do not fall within the scope of the arbitration clause. Two primary contentions buttress Parfi's position: (1) that the claims pending in this action are not dependent on the validity or invalidity of the Underwriting Agreement, but arise solely out of the duties Xcelera and the Director Defendants owed as a matter of the law of fiduciary duty; and (2) that Parfi did not voluntarily submit the claims pending in this action to arbitration.

The problem with Parfi's position is that it ignores the plain language of the arbitration clause. That language does not solely require the arbitration of claims that the Underwriting Agreement was breached or was invalid. The first phrase of the clause, which requires arbitration of claims "arising out of" the Agreement, would seem to cover direct claims for breach of the Agreement or fraud in the inducement. But the drafters of the clause were not content to cover only those claims arising directly under the contract. *Instead, they went on to draft additional language requiring the arbitration of claims "connected" not only to the Underwriting Agreement, but more broadly to the "breach" or the "invalidity" of that Agreement.* The language is, as the defendants argue, quite expansive in scope.[32]

The clause is therefore most logically read as requiring Parfi to arbitrate any claims connected to any alleged breach of the Underwriting Agreement. By its own words in the arbitration proceeding, Parfi has again and again set forth its view that the Challenged Transactions constituted a breach of the Underwriting Agreement, and

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[31] Arb. Award at 25 (emphasis added).

[32] *See Elf Atochem*, 727 A.2d at 294-95 (construing "in connection with" language in an arbitration clause broadly).

were evidence of Xcelera's fraudulent intent at the time the Underwriting Agreement was consummated. The word "connection" means, among other things, a "[r]eference or relation to something else ...".[33] As used in the arbitration clause, the term is most sensibly read as requiring the arbitration of any claims connected (or related) to conduct asserted to be a breach of the Underwriting Agreement or conduct that forms the basis for a claim that the Agreement is invalid.[34] That is, it should be understood as an expression of the parties' desire to have disputes connected to claims that the Underwriting Agreement was invalid or breached arbitrated simultaneously with those claims.

Here, Parfi itself has "connected" its claims in this case to an alleged breach of or invalidity of the Underwriting Agreement. The Challenged Transactions are alleged to have caused the contractual damages that Parfi assertedly suffered and that Parfi sought to recover in the arbitration. Xcelera's conduct in effecting those Transactions was argued to be a breach of the Agreement's implied term that the minority stockholders would not be diluted.

Despite facing pending arguments in this court that its claims here were arbitrable, Parfi itself was unable to "disconnect" its contract claims from the claims pled in this case. It arguments to the arbitrators are replete with references to the Challenged Transactions, which were at the heart of its claims for contractual damages.

Recognizing this vulnerability, Parfi encourages me to read the "in connection with" language in the arbitration clause as only applying to non-contract claims that have

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[33]THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 390 (4th ed.2000).

[34]I conclude so for a reason that is obvious upon closer examination. The arbitrability of a non-contract claim cannot sensibly depend on whether the claim is connected to an actual "breach" of or the actual "invalidity" of the Agreement, because the conclusion as to whether a breach occurred or whether the Agreement is invalid will come only after the arbitration hearing.

legal elements that overlap breach of contract or fraudulent inducement claims, regardless if the non-contract claims address the identical factual conduct as the contract or inducement claims. That is, Parfi argues that its claims in this case are not arbitrable, because they can be proven without the need to prove a breach of the Underwriting Agreement or the invalidity of that Agreement. As noted, the difficulty with this argument is that if the parties to the Underwriting Agreement sought to draft a clause requiring only the arbitration of those claims that have as an element a breach of the Agreement, they could have done so. Instead, they chose the much broader term "in connection with" and used it in a manner that is much more plausibly read as requiring a party to arbitrate any claims connected to conduct that is contended to be a breach of the Agreement.

The commercial good sense of the defendants' reading is more apparent as well. Under their reading, the Agreement requires the resolution of claims related to a common set of underlying facts in a single forum, thus resulting in the efficient use of the parties' litigative resources. By contrast, Parfi's reading encourages the inefficient processing of claims related to identical conduct in different forums. Parfi's reading is also suspect because it leaves little, if any, meaning to the broad "in connection with" language. If other claims based on the same conduct that is also alleged to be a breach of, or the cause of the invalidity of, the Agreement are not "in connection with" a breach or the invalidity of the Agreement, what non-contract claims against a party to the Agreement are so "connected"?[35] For all these reasons, I conclude that the claims asserted in this action are arbitrable.

I therefore reach the separate argument advanced on behalf of plaintiffs Gunnar Gillberg and Grandsen, Ltd., who argue that they are not bound by the arbitration clause

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[35]A tortious interference with contract claim would be so connected, but would typically involve a claim against someone not a party to the Agreement.

because they are not formal signatories to the Underwriting Agreement. I also reject that argument. Gillberg and Grandsen are Mirror AB stockholders who are parties to a joint prosecution agreement with Parfi and stood to gain from any recovery in the arbitration.[36] Parfi, it will be recalled, is the corporate successor to Mirror AB, which was formed as a litigation construct to help its stockholders, including Gillberg and Grandsen, secure relief against Xcelera and the Director Defendants. Gillberg and Grandsen are therefore operating in concert with Parfi and have availed themselves of the benefits of the Underwriting Agreement's arbitration clause.

That Gillberg and Grandsen are not strangers to the Underwriting Agreement is also demonstrated by the fact that they obtained and exercised the opportunity to buy the individual Mirror Image shares they hold under § 7.3 of that Agreement. This right was accorded to them by virtue of their status as Mirror AB stockholders.[37] Given these facts, Gillberg and Grandsen have embraced the Agreement as if they were intended, third-party beneficiaries of that Agreement and cannot now disavow the responsibilities that come with that status.[38]

I confess that the result I reach is somewhat unsatisfying, and undoubtedly leaves Parfi and the other plaintiffs in a pickle. It grates a bit that well-pled claims for breach of fiduciary duty that do not depend on proof of a breach of the Underwriting Agreement would fall within

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[36]Lindbo Dep. at 60.

[37]Section 7.3 of the Agreement provides that holders of more than 100,000 shares of Mirror AB stock could purchase one share of Mirror Image for every 8,000 shares of Mirror AB they owned. As noted above, Gillberg purchased 100 shares and Grandsen purchased 41 shares of Mirror Image pursuant to that section.

[38]*See Westendorf v. Gateway 2000, Inc.*, Del. Ch., C.A. No. 16913, 2000 WL 307369, at *4, Steele, V.C. (Mar. 16, 2000) (when donee beneficiary accepts the benefits of a contract, it must accept the responsibilities contained in the contract's arbitration clause).

the scope of the Agreement's arbitration clause. The reason this decision gnaws at me a bit may be that Parfi's claim that the Challenged Transactions were breaches of the Underwriting Agreement does not find much, if any, support in the text of that contract. But Parfi obviously believed principles of Swedish contract law gave it reason to hope for victory on that claim and its related fraud in the inducement claim. Thus, Parfi and its affiliates float in a brine of their own making, having consciously chosen the risky strategy of dividing factually connected claims.

Once Parfi itself decided that the Challenged Transactions were a breach of the Underwriting Agreement and evidence of the invalidity of that Agreement, it implicated one of the plain purposes of the arbitration clause: to require that all other claims connected to arbitrable breach of contract and fraud in the inducement claims be arbitrated as well. Parfi was the master of its own case. Had it chosen to contest the Challenged Transactions on grounds wholly unrelated to the Underwriting Agreement, then it could have avoided the fate it suffers today. But when it alleged in arbitration that the Challenged Transactions were an integral part of a deliberate plan to breach and/or fraudulently induce the Underwriting Agreement, and sought damages from Xcelera on account of those transactions, Parfi traded away its right to press its perhaps more plausible fiduciary duty claims in this court. Having done so, Parfi has left me no choice but to dismiss its claims, and deny Parfi a second forum in which to seek damages based on the same conduct of Xcelera already examined by the arbitration panel.

My dismissal is obviously without prejudice to the arbitration of the claims, assuming the arbitration panel is willing to entertain them at this late date.

My decision that all of the counts pled in the complaint are arbitrable disposes of this case in its entirety. I could terminate this opinion at this point with the reader's gratitude. The posture of the case, however, persuades me

that it is more efficient for the court and the parties for me to rule, in the alternative, on the other issues presented by the defendants' three-pronged attack on the complaint. I so conclude because of the likelihood of an appeal. To the extent that my decision on the question of arbitrability is overturned in whole or in part, a ruling at this time on the remaining issues will put the parties in the position possibly to obtain authoritative rulings from the Supreme Court on all pleading-stage issues at once, allowing them to proceed with discovery and to trial if the complaint is held on appeal to state claims that can be litigated in this court. It seems to me to risk much waste — in the form of delay and the need for the parties and the court to re-examine subjects now in the forefront of our minds — were I to defer ruling on the multitude of other issues the parties have so furiously and laboriously contested in their many submissions. Therefore, I burden the reader with my resolution of the myriad of other questions posed to me.[39]

B. Xcelera's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction Is Denied Under the "Conspiracy Theory" of Personal Jurisdiction

Xcelera contends that the complaint fails to allege sufficient facts to support the assertion of this court's jurisdiction over it. Because Xcelera is not a resident of Delaware, is not registered to do business here, and did not directly perform any act in Delaware in connection with the events pled in the complaint, it argues that this court has no statutory or constitutional authority to exercise jurisdiction over it.

The problem with Xcelera's argument is that it ignores the reality that under 10 *Del. C.* § 3104(c), the acts of a party's agent within Delaware can be imputed to that

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[39]If my decision on arbitrability is affirmed, the rest of my opinion becomes non-appealable *dicta*, not binding on the parties or the arbitration panel.

party for personal jurisdiction purposes. The conspiracy theory of personal jurisdiction articulated in *Istituto Bancario Italiano SpA v. Hunter Engineering Co.*[40] provides one method to determine whether a non-Delaware defendant such as Xcelera has "committed acts satisfying § 3104 'through an agent.' "[41] The *Istituto* test requires a factual showing that: (1) a conspiracy existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[42]

Here, Parfi has pled facts that, if true, satisfy this test. The complaint alleges that Xcelera and its representatives on the Mirror Image board purposely conceived a plan to dilute the other stockholders of Mirror Image and to secure most of the equity of Mirror Image for Xcelera at a grossly inadequate price. Xcelera's argument that there are no facts pled that indicate that Xcelera had knowledge of any such conspiracy is makeweight. The complaint contains allegations that the Vik brothers and Fajerson worked together to place large amounts of the equity of Mirror Image in Xcelera's hands through a series of self-dealing Transactions effected at an inadequate price. Xcelera's knowledge of this plan can be inferred from its participation in the Transactions, and the fact that its representatives on the Mirror Image board were the moving forces behind them.

The other elements of the *Istituto* test are satisfied because Xcelera is properly charged with responsibility for

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[40]Del.Supr., 449 A.2d 210 (1982).

[41]*HMG/Courtland Properties v. Gray*, Del. Ch., 729 A.2d 300, 307 (1999).

[42]*Istituto Bancario*, 449 A.2d at 225.

two substantial acts that occurred in Delaware in furtherance of the alleged conspiracy to injure a Delaware corporation and its minority stockholders. In September 1999, Mirror Image filed a certificate with the Secretary of State belatedly amending its certificate of incorporation to increase the company's authorized shares. Without this amendment, the earlier issuance of shares to Xcelera in the July Subscription would have violated Mirror Image's charter. Likewise, in late 1999, another certificate amendment was filed with the Secretary of State to facilitate the Convertible Preferred Stock Offering. These acts in Delaware constituted an essential step in the conspiracy and satisfy the *Istituto* test.[43] Furthermore, it is clear that Xcelera had reason to know of those acts because they were authorized by the Vik brothers and Fajerson, who are directors of Xcelera. Indeed, given the Vik brothers' majority control of Xcelera, the inference that Xcelera lacked knowledge of these acts is untenable.

Finally, the complaint sets forth facts sufficient to make the exercise of jurisdiction over Xcelera consistent with the Due Process Clause. Because it is so rigorous and focuses on the out-of-state defendant's Delaware-directed conduct, the *Istituto* test is a sound method by which to examine the constitutionality of an exercise of personal jurisdiction.[44] In this case, the test indicates that Xcelera may be sued here without unfairness. A majority stockholder who wields control of a Delaware subsidiary through a board majority and who effects self-dealing transactions with that subsidiary which require for their implementation acts in Delaware should reasonably expect to face suit here. Delaware has a substantial and legitimate interest in providing a forum for the resolution of claims that corporate fiduciaries, including majority stockholders,

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[43]In *Istituto* itself, the filing of a certificate amendment necessary to the conspiracy was held to satisfy the test. *Id.* at 216- 217.

[44]*See HMG/Courtland*, 729 A.2d at 307.

have breached their duties to the stockholders of a Delaware corporation.[45] Based on the pled facts, Xcelera knew that it was participating in activities that would have a profound effect, for good or ill, on a Delaware corporation, Mirror Image, and its stockholders. As such, the exercise of this court's jurisdiction over it is constitutionally permissible.

C. Mirror Image's Motion to Dismiss the Derivative Claims Under Court of Chancery Rule 23.1 Is Denied

Next, by separate motion, Mirror Image seeks dismissal of the four derivative claims (Counts IV, IX, XIV, and XV) for failure to satisfy the requirements of Court of Chancery Rule 23.1. The defendants argue that Parfi has failed to plead demand futility and that, as a result, the derivative claims in the complaint must be dismissed. The resolution of this issue turns on whether a majority of the Mirror Image board can disinterestedly and independently consider a demand.[46] On this motion, the answer to this question turns on a single director, Fajerson, because the defendants concede that the Viks are incapable of objectively considering a demand and because Parfi did not allege that the other members of the five-member Mirror Image board could not impartially evaluate a demand.

The question as to Fajerson is starkly posed. The only alleged fact that bears on his partiality is his status as a director of both Xcelera and Mirror Image. The complaint does not allege that Fajerson was personally interested in the Challenged Transactions, that he is a stockholder of Xcelera, or that he is a paid officer of either company or another entity controlled by the Viks.

For the following reasons, I conclude that Fajerson's dual directorships render him unable to impartially consider a demand. I start with first principles. Assume

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[45] *Sternberg v. O'Neil*, Del.Supr., 550 A.2d 1105, 1123-24 (1988).

[46] *Aronson v. Lewis*, Del.Supr., 473 A.2d 805, 814 (1984).

that Fajerson had been the only member of the Mirror Image board who also served on the Xcelera board. Even under that assumption, the Transactions challenged in the complaint would have been presumptively voidable unless one of the safe harbors set forth in 8 Del. C. § 144 applied. That is, under § 144, Fajerson's status as a director of another "corporation ... in which one or more of [Mirror Image's] directors or officers are directors or officers" would alone be sufficient to implicate common law voidability concerns. Furthermore, § 144 makes clear that a director such as Fajerson is not considered impartial (or in the words of § 144, disinterested) for purposes of considering a transaction between the corporation (*i.e.*, Mirror Image) and another corporation (*i.e.*, Xcelera) which he also serves as a director. Consistent with § 144, it has also been the practice to consider directors such as Fajerson conflicted for purposes of evaluating whether a transaction is subject to the business judgment rule or entire fairness standards of review.[47] And certainly someone in Fajerson's predicament would never have been appointed to a Mirror Image "special committee of independent, disinterested directors" to consider a transaction with Xcelera.[48] Whether phrased as an interest issue (per § 144) or an independence issue (because of Fajerson's duties to an interested party), Fajerson's role as a director of Xcelera would be seen as disqualifying.

The question thus becomes whether some deviation from this logic is justified in the Rule 23.1 context. I confess

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[47]For that independent reason, the defendants' motion also lacks force. The complaint pleads particularized facts that suggest that the entire fairness standard of review — rather than the business judgement rule — would apply to the Transactions and that the Transactions might not have been fair. As a result, the complaint satisfies the second prong of *Aronson*.

[48]For example, I doubt any lawyer would argue with a straight face that a director in Fajerson's position could serve on a special committee and have that committee be given burden-shifting effect in a case governed by *Kahn v. Lynch Communication Sys.*, Del.Supr., 638 A.2d 1110 (1994).

to being unable to see the non-foolish inconsistency here.[49] A demand regarding the Challenged Transactions would require Fajerson to determine whether Mirror Image should bring suit against Xcelera on claims arguably worth tens of millions of dollars. This would require Fajerson to attempt to consider solely the best interests of Mirror Image, at the same time as Fajerson also owes a fiduciary duty of loyalty to act in the best interests of Xcelera. Perhaps Fajerson is the unusual person who can put such an obvious contradiction in loyalty out of his mind. But the law of demand cannot act on peculiarities of character unique to particular defendants and unknowable to plaintiffs pleading complaints; it must instead proceed on the basis of the more common inferences one draws from specific factual scenarios. The more usual and logical inference is that someone in Fajerson's position would, of course, harbor concern for Xcelera's interests in pondering a demand on Mirror Image.[50] As a result, Fajerson does not qualify as an independent director under the reasoning of our corporation law because "extraneous considerations" cloud his mind.[51]

In so concluding, I recognize that there is case law that implies that to lack independence for demand excusal purposes, Fajerson must be alleged to have been under the domination and control of Xcelera or the Vik brothers or beholden to them in some personal, pecuniary sense. One

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[49]*See* RALPH W. EMERSON, *Self-Reliance, in* ESSAYS, FIRST SERIES ¶ 14 (1841).

[50]The reasoning of cases holding that directors cannot impartially consider demands to sue close relatives supports the conclusion I reach here. *Mizel v. Connelly*, Del. Ch., C.A. No. 16638, 1999 WL 550369, at *4, Strine, V.C. (July 22, 1999 rev. Aug. 2, 1999); *Chaffin v. GNI Group, Inc.*, Del.Ch., C.A. No. 16211, 1999 WL 721569, at *5, Jacobs, V.C. (Sept. 3, 1999); *Harbor Fin. Partners v. Huizenga*, Del. Ch., 751 A.2d 879, 887 (1999).

[51]*Aronson*, 473 A.2d at 816; *Unitrin, Inc. v. Am. Gen. Corp.*, Del.Supr., 651 A.2d 1361, 1375 (1995).

prior case can even be read as holding that directors in precisely Fajerson's situation are deemed independent in the Rule 23.1 context.[52] But the more fundamental reasoning of the governing Supreme Court cases supports the outcome I reach. At bottom, the question of independence turns on whether a director is, *for any substantial reason,* incapable of making a decision with only the best interests of the corporation in mind.[53] That is, the Supreme Court cases ultimately focus on impartiality and objectivity.[54] By any common-sense application of those terms, Fajerson lacks the independence to determine whether Mirror Image should sue Xcelera, a corporation to whom he owes the strict fidelity of a fiduciary. Indeed, in that sense, Fajerson is in fact "beholden" to Xcelera.[55]

It would trivialize our concepts of director fidelity to hold that someone like Fajerson is unconflicted simply because he would have no substantial personal, financial

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[52]*Heineman v. Datapoint Corp.*, Del.Supr., 611 A.2d 950 (1992). *Heineman* can, I suppose, be distinguished on a narrow factual ground. *Heineman* in part involved whether demand was excused because four of the eight DataPoint directors also served on the board of a corporation that received a $350,000-a-year consulting contract challenged by the plaintiffs. In this case, the Challenged Transactions are far more important to Xcelera than the consulting contract in *Heineman* was to the consulting corporation in that case. As a result, a decision by Fajerson to sue Xcelera thus requires him to cause it much greater potential harm. This particularized factual distinction could be said to make the cases different. I confess that this difference does not satisfactorily elide the logical tension between the opinion in that case and this one.

[53]A caveat to this, of course, is that a director is permitted to bear in mind legal and ethical constraints that confine corporate action.

[54]*See, e.g., Brehm v. Eisner*, Del. Supr., 746 A.2d 244, 257 (2000); *Rales v. Blasband*, Del. Supr., 634 A.2d 927, 934 (1993).

[55]THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 163 (4th ed.2000) (beholden means "[o]wing something ... to another"); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 117 (9th ed.1995) ("under obligation").

interest at stake in the demand decision.[56] Human beings act for a variety of reasons. Thankfully, not all of those motivations are financial and people often engage in altruistic behavior.[57] I hew therefore to the optimistic belief that Fajerson could not vote to sue Xcelera without pondering his duty of loyalty to that corporation.

D. The Defendants' Motion to Dismiss Parfi's Fraud Claims Is Granted, And Parfi Shall Restate Its Constructive Fraud Claims As Breach of Fiduciary Duty Claims

The complaint alleges counts of breach of fiduciary duty, fraud, and constructive fraud. For all practical purposes, these claims are indistinguishable. The counts all allege that the Subscriptions and the Preferred Stock Offering involved the issuance of Mirror Image shares to Xcelera in exchange for cash consideration that Xcelera and the Director Defendants knew was worth substantially less than the shares Xcelera received. The fiduciary duty counts make the obvious point that Xcelera is a majority stockholder which controlled the Mirror Image board, and that an issuance of shares to itself for grossly inadequate consideration would constitute a breach of fiduciary duty by it and by the Xcelera directors who served on the Mirror Image board and authorized the Transactions. The defendants have not moved to dismiss those fiduciary duty counts for failure to state a claim.

But the fraud and constructive fraud counts make substantively identical allegations. That is, the fraud or constructive fraud suffered by Mirror Image and its stockholders simply involves the consummation of unfair

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[56] I note that our law would not permit a Delaware lawyer to counsel a client on whether it was advisable to sue another of the lawyer's clients. *See* Del. Rules of Prof. Conduct 1.7 and 1.8 (2001).

[57] *See generally* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, And The Behavioral Foundations Of Corporate Law*, 149 U. PA. L. REV. 1735 (2001).

sales of stock to Xcelera.[58] Because Xcelera is a majority stockholder whose own directors constituted a majority of the Mirror Image board, it and its representatives on the Mirror Image board supposedly committed a fraud on the corporation and the minority shareholders by consciously structuring Transactions that transferred shares to Xcelera at far less than fair value.

Parfi's rationale for pleading the fraud and constructive fraud counts apparently rests in some fear that it will not be able to recover unless it can prove a level of wrongdoing amounting to fraud. This fear arises because Parfi is concerned about the applicability of 8 *Del. C.* § 152, which states in pertinent part that

> The consideration ... for subscriptions to, or the purchase of, the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine. In the absence of actual fraud in the transaction, the judgment of the directors *as to the value of such consideration* shall be conclusive.[59]

This fear is, however, misplaced. Section 152 deals with a situation in which the directors of a corporation have accepted non-cash consideration in exchange for company stock, and there is a dispute raised about whether the non-cash consideration was worth what the directors said it was. To put it more concretely, if a board issued 100 shares of stock to its majority stockholder in exchange for 100,000 bananas that the board valued at $100,000, § 152 would

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[58]The fraud claims are pled as individual claims on behalf of Mirror Image's minority stockholders. The two sets of constructive fraud claims are pled derivatively on behalf of Mirror Image.

[59]8 Del. C. § 152 (emphasis added).

govern any challenge to the directors' valuation of the bananas.

This issue was settled nearly fifty years ago, by Chancellor Seitz, in *Bennett v. Breuil Petroleum Corp.*[60] In that case, the plaintiff challenged a board's decision to make a *pro rata* offering of shares on the basis that the cash price the offerees were asked to pay was substantially too low. The Chancellor rejected the defendants' argument that § 152 "made the directors' judgment as to the value of the property, etc., received for stock conclusive in the absence of a showing of actual fraud ..."[61] He said so because § 152 only "deals with the judgment of the directors as to the value of property received for stock. Our case involves the value of stock issued for cash."[62]

Given the inapplicability of § 152, Parfi's worries seem overwrought. And even if § 152 did apply, it is not apparent that the pleading of additional counts of constructive and actual fraud would help it out. Our courts have been relatively flexible in implementing § 152's "actual fraud" requirement, and for good reason. The term seems to have little to do with common law fraud, the elements of which involve: (1) a false representation of material fact; (2) made with knowledge that the representation is false; (3) an intention to induce the person to whom it is made to act or refrain from acting in reliance upon it; (4) causing that

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[60]Del.Ch., 99 A.2d 236, 240 (1953). *See also* ERNEST L. FOLK, III, RODMAN WARD, JR. & EDWARD P. WELCH, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 152.7, at 152:10-152:11 (2001), (*citing Bennett* for this same proposition); R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 5.13 at 5-25 (2001) (same); D.A. DREXLER, L.S. BLACK, JR., & A.G. SPARKS, III, DELAWARE CORPORATION LAW AND PRACTICE § 17.02 at 17-23 (2001) (same).

[61]*Bennett*, 99 A.2d at 240.

[62]*Id.*

person, in justifiable reliance upon the statement, to take or refrain from taking action, and (5) damages.[63]

The concept of actual fraud under § 152 has to be read in the context in which it is used.[64] When corporate

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[63]*Stephenson v. Capano Dev., Inc.*, Del.Supr., 462 A.2d 1069, 1074 (1983). The parties engage in a debate about whether the law of Delaware or Massachusetts governs Parfi's claims for fraud and constructive fraud. Oddly, the defendants argue that Massachusetts law governs claims that arise out of the relationship between fiduciaries of Mirror Image, a Delaware corporation, and its stockholders. In support of that argument, they point to geographic ties to events in this case and the Commonwealth of Massachusetts — even citing events at a stockholder's meeting occurring in that state in support of the application of Massachusetts law. The defendants appear to be motivated by their perception that the substantive law of Massachusetts is somewhat more favorable to them.

Without answering the question conclusively, I am dubious that Massachusetts law governs Parfi's claims. These claims arise of the relationship between the defendants as fiduciaries of a Delaware corporation and the stockholders of that corporation. The internal affairs doctrine would appear to dictate the application of Delaware law. *See McDermott, Inc. v. Lewis*, Del.Supr., 531 A.2d 206, 215 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 645, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313, cmt. a (1971).

In this context, it is also illogical to place stress on geography. While the defendants may have chosen to conduct their corporate business geographically in Massachusetts, their choice to serve as fiduciaries of a Delaware corporation is a far more important "tie" in this context, because that signals the law that will govern the relationship the defendants had to the corporation and its stockholders. It makes no commercial sense to think that stockholders consider the place of a corporation's headquarters in evaluating their decision to invest. Instead, stockholders who care (and many do) look to see where the corporation is domiciled because that is the source of the law that will govern its internal affairs.

In any event, I largely rule for the defendants on this aspect of their motion, and the result would be appropriate under either state's law.

[64]It should also be remembered that § 152 was adopted to deal with a specific constitutional issue arising out of Article IX, § 3 of the Delaware Constitution of 1897, *see* BALOTTI & FINKELSTEIN, *supra*, § 5.13 at 5-23, and not as an overarching provision sweeping to the side the

directors allow the corporation to accept bananas they know to be worth $10,000 on the open market from a majority stockholder in exchange for $100,000 worth of corporate stock, they have *in colloquial terms* committed a "fraud on the corporation" they are entrusted to manage. Even though the transaction itself may not have involved any material false statement or detrimental reliance, the corporation has in layman's terms been snookered because the directors consummated a transaction on terms they knew to be unfair to the corporation. Put another way, they knew that the non-cash consideration they were causing the corporation to accept was not worth the cash value they impliedly or explicitly placed upon it. As a result, our courts have said that § 152 does not bar a challenge to the directors' judgment on the value of non-cash consideration when an "excessive valuation ... is so gross as to lead the Court to conclude that it was due, not to an honest error of judgment but to bad faith or a reckless indifference to the rights of others."[65] Furthermore, when § 152 applies, there is authority that suggests that the statutory "actual fraud" provision does not provide a defense when the underlying transaction involves unfair self-dealing proscribed by equitable fiduciary duty concepts.[66]

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traditional equitable principles of fiduciary duty that otherwise govern self-dealing transactions.

[65] *Lewis v. Scotten Dillon Co.*, Del. Ch., 306 A.2d 755, 757 (1973); *see also Fidanque v. American Maracaibo Co.*, Del. Ch., 92 A.2d 311, 321 (1952) (same). The flexibility of this approach is further illustrated in *Diamond State Brewery, Inc. v. De La Rigaudiere*, Del. Ch., 17 A.2d 313, 316-17 (1941) (gross overvaluation and partial failure of consideration can lead to a finding of actual fraud).

[66] *Lofland v. Cahall*, Del.Supr., 118 A. 1, 8 (1922); BALOTTI & FINKELSTEIN, *supra*, § 5.13 at 5-25 & 5-28; *see also Plechner v. Widener College, Inc.*, 418 F.Supp. 1282, 1298 (E.D.Pa.1976) (fact that transaction passes statutory muster under § 152 as not involving actual fraud, does not prevent an equitable inquiry into whether the transaction involved unfair self-dealing by the directors or oppression of minority stockholders), *aff'd*, 569 F.2d 1250 (3d Cir.1977).

I provide this overview as a logical predicate to my determination that the complaint does not state claims for fraud or constructive fraud which are in any litigable sense distinguishable from Parfi's breach of fiduciary duty claims. In essence, the complaint alleges that a fraud was committed upon the minority stockholders of Mirror Image and Mirror Image itself because Xcelera and its representatives on the Mirror Image board knew that Xcelera was not paying a fair price. Parfi argues that because Mirror Image and Xcelera consummated and announced these transactions, Mirror Image and Xcelera made an implied representation that the price to be paid was fair. Because this implied representation was false, Parfi asserts that the false representation element of common law fraud is satisfied.

In support of this proposition, Parfi cites no cases but asks me to set a new precedent. I refuse to do so because I see no utility in breaking new ground here. The law of fiduciary duty provides a flexible and plaintiff- friendly remedy for situations when conflicted directors issue additional shares to a majority stockholder for inadequate consideration. To the extent that Parfi can show that the Director Defendants knew that Xcelera was paying too little, they and Xcelera will be liable for a breach of the fiduciary duty of loyalty — a liability exposing them to serious remedies. In view of this reality, it makes no sense for me to hold that every consciously unfair self- dealing transaction involves an implied false representation of fact directed to the corporation or its stockholders, giving rise to a claim for common law fraud. This seems to me to strain the tort of fraud for no useful purpose.

An additional reason exists to dismiss the fraud counts. Parfi fails to plead any detrimental reliance. The complaint does not allege any way in which the minority stockholders relied on the impliedly false representation that the Challenged Transactions were fair. Indeed, the complaint pleads facts (as have Parfi's briefs) indicating that the minority stockholders believed the Challenged

Transactions to be wrongful at the time they were consummated. And the whole concept of reliance is rather unusual in this context. The Convertible Preferred Stock Offering, of course, did not involve any opportunity for the minority stockholders to purchase anything. Moreover, while the April and July Subscriptions did involve a putative opportunity for the minority stockholders to participate, the only arguable detrimental reliance is that the minority stockholders did not participate because they had not been told that the price for participation was unfairly low to the corporation. Had they been told, so the theory goes, the minority would have joined in the alleged wrongdoing.[67] This strange theory of reliance makes its way into the briefs,[68] but is contradicted by the other parts of the complaint that indicate that the minority stockholders in fact believed the transactions to be unfair from the get-go.[69] With the certainty required for dismissal, one can therefore confidently conclude that the complaint does not plead detrimental reliance with the particularity required to sustain a fraud claim.

Turning to the so-called "constructive fraud" counts, the same logic motivates me, but the oddities of the complaint require a somewhat different remedy. The derivative constructive fraud counts simply reiterate the individual breach of fiduciary duty counts. The concept of constructive fraud is an ill-defined one, but generally exists to prevent wrongdoing by someone who occupies a special

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[67]In putting it this way, I note the following caveat: If one hundred percent of a corporate stockholder base elects to issue new equity to themselves on a *pro rata* basis for new investments of capital, an argument can be made that price is irrelevant to fairness so long as everyone participates.

[68]*See* Pls. Ans. Br. to Mot. of Defs. Xcelera, A. Vik, G. Vik & Fajerson to Dismiss Or Stay In Its Entirety at 21.

[69]*See, e.g.*, Compl. ¶ ¶ 40-51 (April Subscription); ¶ 68 (July Subscription); ¶ 79 (Convertible Preferred Stock Offering); ¶ 85 (Exodus Transaction).

position of confidence or trust, such as that of a fiduciary.[70] Our corporate case law has thrown this concept around in a not particularly precise way, but always in a context in which the court is examining whether directors have complied with their fiduciary duties. For example, Chancellor Seitz held that a claim of "constructive fraud" had been pled in a case when it was alleged that corporate stock was being offered on a *pro rata* basis to all stockholders at a "price more than six times less its value."[71] He reasoned that the minority stockholders had the right not to purchase, and should have protection from dilution by the issuance of shares to other stockholders at a price unfair to the corporation. If the minority stockholders could show that the directors had set the price in bad faith or for an improper motive, then the minority stockholders could recover.[72]

I read *Bennett* and the other cases as using the words "constructive fraud" to describe a breach of fiduciary duty, and not as using it as a separate, independent tort.[73] The concept simply captures in more provocative terms the reality that it is a breach of fiduciary duty for directors consciously to transfer corporate assets in exchange for grossly overvalued consideration, particularly when the motivation for the transaction is entrenchment and/or dilution of the minority.

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[70]37 AM. JUR. FRAUD AND DECEIT § 8 at 38-39 (2001) (Constructive fraud "arises on a breach of duty by one in a confidential or fiduciary relationship to another that induces justifiable reliance by the other to his or her prejudice"); *see also Italo-Petroleum Corp. of America v. Hannigan*, Del. Supr., 14 A.2d 401, 407-8 (1940) ("Constructive fraud is a breach of legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.").

[71]*Bennett*, 99 A.2d. at 240.

[72]*Id.* at 240-41.

[73]*Id.* at 236; *Lofland v. Cahall*, 118 A. at 8.

If Parfi can show that the Mirror Image board consciously issued stock to Xcelera for too little value, Parfi will demonstrate a breach of the fiduciary duty of loyalty. To the extent that the same proof can be said to constitute "constructive fraud," it is because that concept is simply a way of analyzing an abuse of a special relationship. For that reason, Parfi should amend the complaint to transform its derivative constructive fraud counts into straightforward breach of fiduciary duty counts. This conversion will not be injurious to Parfi. Fiduciary duty concepts, after all, permit a judgment against Xcelera[74] if it cannot show that the Challenged Transactions are fair, because the Transactions implicate the entire fairness standard. Thus, liability may flow under fiduciary principles without any proof of conscious wrongdoing or bad faith.[75]

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[74]The Vik brothers would also seem to face the same liability problem. Director Fajerson stands in an arguably different, although still uncomfortable, posture.

[75]The parties also duel over Parfi's attempt to name Mirror Image as more than a nominal defendant to the counts in the complaint. For the reasons already stated, I find that the complaint only states claims for breach of fiduciary duty. Mirror Image cannot be held liable for breaches of fiduciary duty committed by its directors or majority stockholder. *Arnold v. Soc'y for Sav. Bancorp., Inc.*, Del. Supr., 678 A.2d 533, 539- 40 (1996); *In re Wheelabrator Techs. Shareholders Litig.*, Del.Ch., C.A. No. 11495, 1992 WL 212595, at *9, Jacobs, V.C. (Sept. 1, 1992). Therefore, the counts in the complaint are dismissed as against Mirror Image, although Mirror Image remains a nominal party because of the derivative nature of several, if not indeed all, of Parfi's claims.

In addition, Mirror Image has also moved to dismiss Parfi's constructive fraud claim directed to the April Subscription on the grounds that a demand was in fact made as to this Transaction. Under Delaware law, the making of a demand has been deemed to be an admission by the proponent that the board can impartially act on the demand. Because of the litigative importance of that consequence, this court has been careful about labeling communications to boards about corporate transactions as demands unless there is clear and unambiguous evidence supporting the attachment of that label. Specifically, this court will not consider a communication a demand unless it clearly and specifically states: (1) the identity of the alleged wrongdoers; (2) the

E. Parfi's Civil Conspiracy Claim Must Be Dismissed

Nor has Parfi stated a claim for civil conspiracy under Counts V and X of their complaint. Civil conspiracy is not an independent cause of action, but requires proof of underlying wrong that would be actionable absent conspiracy.[76] It requires the combination of two or more persons for an unlawful purpose or for the accomplishment of a lawful purpose by unlawful means, and resulting damages.[77]

Civil conspiracy thus provides a mechanism to impute liability to those not a direct party to the underlying tort. As such, it can be viewed as parallel to aiding and abetting. Indeed, in *In re Lukens Inc. Shareholders Litigation,* Vice Chancellor Lamb cited the elements of civil conspiracy as being the very same elements required to set forth a case

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wrongdoing they allegedly perpetrated and the resultant injury to the corporation; and (3) the legal action the shareholder wants the board to take on the corporation's behalf. *Yaw v. Talley,* Del. Ch., C.A. No. 12882, 1994 WL 89019, at *7, Jacobs, V.C. (Mar. 2, 1994). Mirror Image bears the burden to prove that this test has satisfied.

The ambiguous and confusing communication to the Mirror Image board that is contended to be a demand does not meet the second and third prongs of this test for several reasons, including (i) the absence of any reference to unfair price or any demand for the board to cause Mirror Image to file suit against Xcelera or any director, (ii) the communication's apparent focus on the possibility that Parfi might bring *direct* claims regarding the April Subscription, and (iii) the communication's confusing intermingling of a discussion of the April Subscription and a books and records demand.

[76]*Nutt v. A.C. & S. Co., Inc.,* Del. Super., 517 A.2d 690, 694 (1986); *see also Phoenix Canada Oil Co. v. Texaco, Inc.,* 560 F.Supp. 1372, 1388 (D. Del.1983).

[77]*Weinberger v. UOP, Inc.,* Del. Ch., 426 A.2d 1333, 1348 (1981), *rev'd on other grounds,* Del.Supr., 457 A.2d 701 (1983); *see also Gilbert v. El Paso Co.,* Del.Ch., 490 A.2d 1050, 1057 (1984).

of aiding and abetting.[78] Because there already exist direct claims for breach of fiduciary duty against the Director Defendants and Xcelera, there are no parties over whom this court needs to cast an imputational net. For this reason, plaintiffs' civil conspiracy claims (Counts V and X) are therefore dismissed.

F. The Complaint Does Not State Claims for Breach of Implied Contract Or Tortious Interference With Contract

Parfi also asserts two claims based on a purported implied contract between the minority stockholders and Xcelera. It alleges that Xcelera's "course of conduct," as manifested by the April 1999 and July 1999 Subscriptions, led to the creation of an implied contract that future stock offerings of Mirror Image would be made available to all shareholders on equal and identical terms.[79] By failing to allow the minority stockholders to participate in the Convertible Stock Offering, Parfi contends, Xcelera breached that implied contract. They further argue that because the Director Defendants were aware of this implied contract, and "knowingly caused [Xcelera] not to honor its contractual obligations," the Director Defendants tortiously interfered with that implied contract.[80]

To determine if such an implied contract existed I must, of course, find sufficient conduct by the parties to infer an intent between Xcelera and the minority stockholders to enter such an agreement. "A contract will be implied in fact only when the Court may fairly infer such an

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[78]Del.Ch., 757 A.2d 720, 734-35 (1999), *citing Gilbert v. El Paso*, *supra* at 1057.

[79]Compl. ¶ ¶ 160-61.

[80]*Id.* ¶ 170.

intent from the evidence; it represents the presumed intention of the parties as indicated by their conduct."[81]

To support its implied contract claim, Parfi has asserted that Xcelera's "course of conduct," as manifested in its behavior in connection with the first two Subscriptions, created such a contract. If anything, the facts Parfi has alleged suggest a contrary conclusion. For instance, Parfi pleads that the April Subscription was structured so that for all practical purposes, the minority stockholders could not participate; to wit, Parfi has contended that the resolution authorizing the Subscription was so vague that it "failed to identify all shareholders who were entitled to subscribe";[82] that the payment deadlines were unfairly harsh; and that the minority stockholders' requests for additional information concerning the need for additional capital consistently were refused.

In addition, the pled facts about the Director Defendants' behavior in connection with the July Subscription even more strongly suggest that there was no implied contract that all shareholders would have equal access to offerings of Mirror Image shares. For example, Parfi alleges that because of a first- come, first-served provision in that Subscription, the entire transaction was a "sham" in the sense that Xcelera had already subscribed to the entire Subscription.[83]

Because Parfi has failed to plead facts supporting the existence of an implied contract, I hereby dismiss Counts XI

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[81]*Creditors' Comm. of Essex Builders, Inc. v. Farmers Bank*, Del. Supr., 251 A.2d 546, 548 (1969); *see also Trincia v. Testardi*, Del. Ch., 57 A.2d 638, 641 (1948) (an implied agreement is arrived at by acts; the difference between the implied and express contracts is only in the evidence by which they are proved); 17A AM.JUR.2d § 13 ("An implied contract between two parties is raised only when the facts are such that an intent may fairly be inferred on their part to make such a contract.").

[82]Compl. ¶ 50.

[83]*Id.* ¶ ¶ 67-68.

and XII of its complaint alleging breach of implied contract and tortious interference with contract, respectively.

IV. Conclusion

For the foregoing reasons, summary judgment is granted for defendants and the complaint is dismissed in its entirety because all the claims are arbitrable. In the alternative, I:(a) dismiss the fraud, civil conspiracy, and implied contract claims (Counts III, V, VIII, X, XI, XII, and XIII) for failure to state a claim for which relief may be granted; (b) require that the derivative constructive fraud claims (Counts IV, IX, and XIV) be amended and re-alleged as claims for breaches of fiduciary duty; and (c) otherwise reject the arguments made in defendants' motions to dismiss. The defendants shall submit a conforming final order, approved as to form, within seven days.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD.,	)	No. 27, 2002
Plaintiffs Below, Appellants,	)	
v.	Court Below: Court of Chancery of the State of Delaware in and for New Castle County, C.A. No. 18507	
MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,	)	
Defendants Below, Appellees.	)	

Submitted: November 27, 2002
Decided: December 9, 2002
Filed: December 9, 2002

Before **VEASEY**, Chief Justice, **WALSH, HOLLAND** and **STEELE**, Justices, and **RIDGELY**, President Judge,* constituting the Court en Banc.

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*Sitting by designation pursuant to Del. Const. art. IV, § 12.

ORDER

This 9th day of December 2002, it appears to the Court that:

(1) On November 15, 2002, appellees filed a motion for reargument, pursuant to Supreme Court Rule 18, of this Court's Opinion dated November 4, 2002.

(2) On November 27, 2002, at the request of the Court, the appellants filed an answer to the motion for reargument.

(3) The Court has carefully considered the motion for reargument and the answer, and concludes that the motion should be denied.

NOW, THEREFORE, IT IS ORDERED that the motion for reargument is **DENIED.**

BY THE COURT:

/s/
E. Norman Veasey
Chief Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD.,	)	No. 27, 2002
	)	APPEAL FROM THE COURT OF CHANCERY IN AND FOR NEW CASTLE COUNTY, C.A. NO. 18507
Plaintiffs Below-Appellants,	)	
v.	)	
MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,	)	
Defendants Below-Appellees.	)	

MOTION FOR REARGUMENT

Pursuant to Delaware Supreme Court Rule 18, Defendants Below-Appellees Mirror Image Internet, Inc., Xcelera.com Inc., Alexander M. Vik, Gustav Vik and Hans Magnus Fajerson (collectively, "Defendants") hereby request reargument of this Court's November 4, 2002 opinion (the "Opinion"). The Opinion adopted a policy concerning arbitration agreements that conflicts with the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). This conflict with the FAA is a "question of exceptional importance" that weighs strongly in favor of reargument.

The FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25. This is especially true where, as here, the arbitration clause is in a

commercial, international agreement between foreign parties. As the United States Supreme Court held in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995), "the FAA is also based in part on an international convention ... intended to encourage the recognition and enforcement of commercial arbitration agreements in international contracts" (internal quotation marks omitted).

The FAA is also "a substantive rule applicable in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). The United States Supreme Court has held that the FAA "declared a national policy favoring arbitration," and that "nothing in the Act indicat[es] that the broad principle of enforceability is subject to any additional limitations under State law." *Id.* at 10-11. Where states have adopted rules concerning arbitration that conflict with the FAA's broad presumption in favor of arbitrability, those state laws have been invalidated by the United States Supreme Court. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (striking Montana law); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (striking Alabama law); *Southland*, 465 U.S. 1 (striking California law).

On an issue that this Court conceded was a matter "of first impression," *see* Op. at 11, the Opinion established as a matter of Delaware law principles concerning the interpretation and application of arbitration agreements that directly conflict with the FAA.

First, the Opinion shifted the presumption from one in favor of arbitrability to one against arbitrability for breach of fiduciary duty claims. The Opinion held that "[a]bsent a clear expression of an intent to arbitrate breach of fiduciary duty claims," such claims cannot be subject to arbitration. *Id.* at 21. Applying this standard, the Court refused to compel arbitration even though the Court could conclude only that "[t]he parties *likely* did not intend the provision to act as a bar to litigation" of the breach of fiduciary duty claims. *Id.* at 20 (emphasis added). The FAA, however, requires that "any doubts concerning the scope of arbitrable

issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. The Opinion establishes that under Delaware law, the presumption must be one *against* arbitration and in favor of litigation for breach of fiduciary duty claims.

Second, the Opinion impermissibly based its holding on "whether the fiduciary duty claims would be assertable had there been no Underwriting Agreement." Op. at 16. The Court's substantive decision – that the breach of fiduciary duty claims were not arbitrable because "they would be independently and separately assertable" – establishes a rule that a claim can never be arbitrated if it could be *independently and separately* asserted without the existence of an agreement between the parties. *Id.* at 16. This rule flatly contradicts the FAA, which permits parties to arbitrate disputes under the Securities Exchange Act of 1934, conspiracy claims under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act, and antitrust claims under the Sherman and Clayton Acts. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (civil RICO); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (securities); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (antitrust). An individual can bring any of those federal statutory claims against a party without being in a prior contractual relationship with that party. Thus, those claims are "independently and separately assertable," but are nonetheless subject to arbitration under the FAA. Because the Opinion held that a claim escapes arbitration if a party could assert that claim regardless of whether the contract existed, the Opinion conflicts with the FAA.

Finally, the Opinion violates the FAA by holding that contracting parties' ability to agree to arbitration is completely constrained by the subject matter of the contract, irrespective of what the parties agreed to arbitrate as set forth in the arbitration clause itself. The Court held that "[w]hen contracting parties provide for [arbitration], the

arbitration provision, *no matter how broadly drafted*, can reach only the claims within the scope of the contract." Op. at 1 (emphasis added). Under the Court's approach, the scope of the arbitration clause becomes irrelevant: whatever the language in the arbitration clause, the only claims that can be arbitrated are those that "touch on" or "bear on the duties and obligations" set forth in the underlying agreement. *Id.* at 13, 14. In holding that an entire class of claims encompassed by a broadly drafted arbitration clause may not be arbitrated, the Court effectively adopted a rule that prevents, as a practical matter, an arbitration clause from being given its full contractual effect. The impact of this rule is qualitatively no different than the wholesale refusal to enforce arbitration clauses generally, a practice the United States Supreme Court has rejected under the FAA based on reasoning applicable here:

> What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the [FAA]'s language and Congress' intent.

Allied-Bruce, 513 U.S. at 281.

For these reasons, the decision of the Court as set forth in its Opinion conflicts with the well-settled provisions of the FAA. Defendants respectfully request that this Court reconsider the Opinion in light of the considerations set forth herein.

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Attorneys for Appellees

Dated: November 15, 2002

SUPREME COURT OF DELAWARE

#43

November 19, 2002

Melanie K. Sharp, Esquire
P.O. Box 391
Wilmington, DE 19899

Re: *Parfi Holding AB, et al. v. Mirror Image Internet, et al.*,
No. 27, 2002

Dear Counselor:

The Court is in receipt of the appellee's motion for reargument filed in the above captioned matter. The Court has requested that the appellant file an answer, not to exceed 4 pages, no later than **November 27, 2002.**

Very truly yours,

/s/
Cathy L. Howard [Clerk]

cc: Jesse A. Finkelstein, Esquire

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD.,	)	No. 27, 2002
Plaintiffs Below, Appellants,	)	
Court Below: Court of Chancery of the State of Delaware in and New Castle County	)	
v.	)	
	)	C.A. No. 18507
MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK GUSTAV VIK and HANS MAGNUS FAJERSON	)	
Defendants Below, Appellees)	)	

PLAINTIFFS' OPPOSITION TO MOTION TO REARGUE

The Plaintiffs-Appellants oppose the Defendant-Appellees' request for reargument because the argument has never been raised before, consistency with the FAA is irrelevant, an in any event, there is nothing in this Court's decision that conflicts with the Federal Arbitration Act ("FAA").

The Defendants' sudden assertion that the propriety of this Court's decision hinges on consistency with the FAA has never before been raised and is thus dismissible on that ground alone. See, e.g., Wilmington Trust Co. v. Conner,

415 A.2d 773, 781 (Del. 1980). All parties proceeded on the premise that the Delaware Arbitration Act controlled. See Parfi Holding AB v. Mirror Image Internet, Inc., 794 A.2d 1211 (Del. Ch. 2001). Thus, even if this Court's decision was inconsistent with the FAA, which it is not, that fact is irrelevant. See Volt Infor. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989) (where parties agree that state law applies to arbitration contract otherwise governed by FAA, agreement will be honored even if result under state law is different from what would arise under federal law).

Moreover, the Defendants' concern for consistency with the FAA must be questioned as they based their appeal on the assertion that Delaware law was different that Federal law. See Appellee's Br. At 25. In fact, defendants explicitly attempted to distinguish the federal cases on which plaintiffs relied. See Appellee's Br. at 26, distinguishing Tracer Research Group v. National Nat'l. Serv. Co., 42 F.3d 1292, 1295 (9th Cir. 1994); United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 1996 U.S. App. LEXIS 1906, at *4 (10th Cir. 1996); Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511 (10th Cir. 1995); and Fuller v. Guthrie, 565 F.2d 259 (2d Cir. 1997), as applying inapposite federal law under the FAA. Having lost that argument, Defendants now assert that this "new" Delaware approach is different from the approach under the FAA, but do not cite a single federal case that involves the proper interpretation of the scope of an arbitration clause. The cases cited either involve state laws that impermissibly attempted to generally invalidate arbitration agreements (Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Allied Bruce Terminex Cos. v. Dobson, 513 U.S. 265 (1995)); or that involved the question of whether certain federal statutory claims (i.e., securities, anti-trust and RICO) were, as a matter of public policy, ever arbitrable. See Rodriguez de Oujas v. Shearson American Express, Inc., 490 U.S. 477 (1989); Shearson American Express, Inc. v. McMahon 482 US

220 (1987); (Mitsubishi Motors Corp. v. Soler-Chysler-Plymouth, 473 U.S. 614 (1985).

Moreover, as both the First Circuit held in Mitsubishi, and the Tenth Circuit held in Coors, "[A]n arbitration clause 'does not extend to all disputes of any sort...but only to disputes touching specified provisions of the Agreement.'" Coors, 51 F.3d at 1516 (quoting Mitsubishi, 723 F.2d at 159).[1] In other words, the analysis employed by this Court is entirely consistent with that employed under FAA.

Defendants' twin assertions, that this Court has created a presumption against the arbitrability of fiduciary duty claims, and that no claims independently viable from the contract can ever be arbitrated, are meritless for the same reason. This Court simply looked to see if the parties voluntarily agreed to commit to arbitration all species of claims arising out of the shareholder relationship. In doing so, the Court necessarily evaluated the limited subject matter of the contract in which the arbitration clause appears. Compare Elf Atochem N.Am. Inc. v. Jaffari, 727 A.2d 286, 294-95 (Del. 1999) and SEC Interactive, Inc. v. Corporate Media Partners, 714 A.2d 758, 761 (Del. 1988), where the arbitration clause appeared in the organic document governing the entire relationship between the parties.

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[1]Indeed, in Mitsubishi Motors Corp., 473 U.S. 614 (1985), the Supreme Court restated approvingly the First Circuit's methodology in determining that some of the arbitration claims were arbitrable because they arose from performance of specific provisions of the underlying dealer agreement, and others were not because they did not depend on the agreement. Id. at 622 n.9.

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Co-Counsel for Plaintiffs Below-Appellants

Dated: November 27, 2002

MIRROR IMAGE INTERNET AB
THE SCANDINAVIA COMPANY INC.

PLENTEOUS CORP.

UNDERWRITING AGREEMENT

THIS UNDERWRITING AGREEMENT is made as of the 25th day of March, 1999

BETWEEN

(1) Mirror Image Internet AB, (registered number 556532-0743), a company incorporated under the laws of Sweden whose registered office is at Box 1043, 101 38 Stockholm, (the "Owner"); and

(2) The Scandinavia Company, Inc., a company incorporated under the laws of the Cayman Islands, whose registered office at RHB Trust Co. Ltd., P.O. Box 1787, 3rd Floor, One Regis Place, Grand Cayman, Cayman Islands, British West Indies, and
Plenteous Corporation, a company incorporated under the laws of Panama, whose registered office is at Bank Boston Building, 8th floor, apt. 04297, Panama 5, Republic of Panama (the "Underwriters").

WITNESSETH

A. WHEREAS the Owner owns all of the issued and outstanding share capital of Mirror Image Internet, Inc., (the "Company"), a company incorporated under the laws of the State of Delaware, whose registered office is at 18, Commerce Way, Woburn,

Massachusetts, having an issued share capital of USD 1,000 divided into 1,000 shares, each with par value of USD 1.

B. WHEREAS the parties hereto desire that Underwriters guarantees the full subscription of new shares in the Company on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, the parties hereto agree as follows:

1. INTERPRETATION

1.1 In this Agreement:

"Business Day"	means the day (other than a Saturday or Sunday) on which banks are generally open in Massachusetts and in Sweden for normal business;
"Closing"	means completion of the sale of the Shares in accordance with Section 4 below;
"Confidential Information"	means any and all information of any kind or nature whatsoever, whether written or oral, including, without limitation, financial information, trade

	secrets, client lists and other proprietary business information, regarding the Company or the Owner, which information is not known to the general public or to persons unaffiliated with the Company or the Owner, as the case may be;
"Intellectual Property"	means patents, granted and pending, as well as the bespoke software acquired by and developed within the Company, as described in a list attached as Schedule 4;
"Key Employees"	means those persons employed by the Company who are named in a list attached in Schedule 5;
"Material Adverse Effect"	shall mean any effect which gives rise to or is reasonably likely to give rise to a material adverse effect on the assets or financial condition of the

Company;

"Material Agreement" shall mean existing agreements of the Company, having an annual turnover exceeding USD 50,000 during 1998 and which cannot be terminated at the Company's discretion by applying a notice period shorter than three (3) months;

1.2 Any statement in this Agreement (including the Schedules) qualified by the expression "to the best of the Owner's knowledge" or "so far as the Owner is aware" or any similar expression shall mean that it is made after due and careful inquiry of the Board Members only.

1.3 The headings in this Agreement do not affect its interpretation.

1.4 The Schedules form part of this Agreement.

2. SHARE ISSUE AND SUBSCRIPTION

2.1 The Owner shall execute a shareholders meeting in the Company and decide to issue new shares of the Company and the Underwriters shall subscribe to shares in accordance with the terms of this Agreement.

4. CLOSING

4.1 Closing shall take place at 10 Ashton Drive, Greenwich, Connecticut, on March 29, 1999 (the "Closing Date").

4.2 At Closing the Owner shall procure:

(a) the delivery to the Underwriters of

(i) the written resignations of each of the Board Members, effective as of Closing Date, in each case acknowledging that he has no claim against the Company whether for loss of office or otherwise;

(ii) the Articles of Incorporation, and all amendments thereto, certified by the Secretary of State of the Commonwealth of Massachusetts;

(iii) a Certificate from the Secretary of State of Commonwealth of Massachusetts certifying the good standing of the Company;

(iv) The Minutes of the Extra Ordinary General Meeting and Minutes of the Board Meeting of the Owner, where the transactions contemplated hereby where approved;

(v) copies of such other documents and papers as Underwriters or its counsel may reasonably request in connection

therewith, listed no later than March 24, 1999, all in form and substance reasonably satisfactory to Underwriters and its counsel.

(b) that a general meeting and a board meeting of the Company is held at which it is resolved that:

(i) such persons as the Underwriters nominates are appointed as directors and deputy directors of the Company;

(ii) the present directors are indemnified for the period until Closing;

(iii) the issue of shares is executed according to the terms of this agreement.

4.3 At Closing the Underwriters shall:

(a) execute payment according to the payment schedule

4.4 At Closing the Company shall:

(a) issue 1,938 shares to the Underwriters

5. REPRESENTATIONS AND WARRANTIES OF THE OWNER

The Owner hereby represents and warrants to the Underwriters as the date hereof and at Closing that:

5.1 Power and authority of the Owner

(a) The Owner is a company duly organized and validly existing under the laws of Sweden.

(b) The Owner shall full power and authority to procure the execution and performance of this Agreement and all related documents delivered by the Owner at Closing is and will be within the authority of the officers of the Owner who execute them and they will constitute valid and binding obligations of the Owner.

5.2 Violation of Laws and Regulations

The Owner guarantees that the completion of the transactions contemplated hereby:

(i) will not violate any provision of the articles of association of the Owner. (Note that the completion will require a general meeting of the Owner.);

(ii) will not to any material extent violate any statute, rule, regulation, order or decree of any public body or authority by which the Owner or any of its properties or assets is bound; and

(iii) will not to any material extent result in a violation or breach of, or constitute a default under, any license, franchise, permit, agreement or other instrument to which the Owner is a party, or by which the Owner or any of its properties or assets is bound,

excluding from the foregoing Sections (i) to (iii)

violations, breaches or defaults which, either individually or in the aggregate, would not prevent the Owner from performing its obligations under this Agreement or the completion of the transactions contemplated by this Agreement.

5.3 Existence of the Company

The Company is duly organized and validly existing in good standing under the laws of the State of Delaware.

5.4 Corporate records and documentation

The Owner has furnished to Underwriters a complete and correct copy of the Company's Certificate of incorporation, articles of association and bylaws. The Company's Certificate of incorporation, articles of association and bylaws are in full force and effect, and the Company is not in violation of any of the provisions thereof.

5.5 The Shares

There are 1,000 Shares issued by the Company, out of a total of 16,000 registered shares. The Shares represent one hundred per cent (100%) of all of the issued share capital of the Company and one hundred per cent (100%) of the voting power of the Shares, and the Shares have been duly authorized, validly issued and are fully paid. Subject to shareholders' meeting approval, there is an outstanding option to convert a loan to the Company into a total of 291 shares. This conversion will be performed before Closing. There are no other outstanding obligations,

warrants, options, preemptive rights or other agreements to which any of the Owner or the Company is a party or otherwise bound, providing for the issuance of any additional shares or for the purchase, repurchase, redemption or other acquisition of the Shares, except for this Agreement.

5.6 Financial Statements

Attached hereto as Schedule 6 copies of audited combined financial statements of the Company and its UK subsidiary for Fiscal Year ended December 31, 1998, including audited balance sheets of the Company as of the end of Fiscal Years 1998 and audited statements of income, changes in Shareholders' Equity and cash flows of the Company for each such Fiscal Year. The Financial Statements have been prepared in accordance with generally accepted accounting principles applied on a consistent basis during the respective periods. The Financial Statements are complete and present fairly in all material respects the combined financial position of the Company as of such dates and the results of its operations and changes in its cash flows, as the case may be, for such periods subject to normal recurring year-end adjustments. The Company does not have any obligation or liability, individually or in the aggregate, of the nature required to be disclosed on a balance sheet prepared in accordance with generally accepted accounting principles that is not disclosed by the Financial Statements referred to above. Also included are unaudited figures for January 1999.

5.7 Dividends

From its inception the Company has not declared any dividends or made any other distributions of its profits or assets to its shareholders.

5.8 Taxes

(a) All notices, computations and returns which ought to have been given or made have been properly and duly submitted by the Company to the relevant taxation or excise authority and all information, notices, computations and returns submitted to such authorities are true and accurate and are not subject of any material dispute nor are likely to become the subject of any material dispute with such authorities.

(b) All taxes of any nature whatsoever for which the Company is liable have been duly paid or revered for in the Accounts.

(c) The Company has never suffered any investigation, audit or visit by any taxation or excise authority, and the Owner is not aware of any such investigation, audit or visit planned for the next twelve months.

(d) All amounts required to be withheld or collected under applicable foreign, federal, state, local or other tax laws and regulations by the Company for income taxes, social security taxes, unemployment insurance and other employee withholding taxes, or other

Taxes, have been so withheld or collected, and such withholding or collection has either been paid to the respective governmental agencies or set aside in accounts for such purpose or accrued and reserved against and entered on the Financial Statements.

The Company is not primarily or jointly and severally liable for the taxes of any other person as a result of having been an affiliate or receiving substantially all of the assets of such person.

5.9 Assets and Properties

The Company has exclusive title to all of the personal and real property and other assets reflected in the Accounts, except for such assets that are leased. The Assets will not be subject to encumbrances, mortgages, liens, charges or other restrictions and the Company has not provided any guarantees.

5.10 Agreements

(a) There are no other Material Agreements, than those listed in Schedule 7, of which full copies (to the extent such agreements are in writing or a summary thereof of any oral agreements) have been disclosed to the Underwriters.

(b) The Company has neither received nor given notice of termination of any Material Agreement.

(c) No party to any Material Agreement has the right to terminate or modify its obligations as a result of the transactions contemplated herein.

(d) The Company is not in default under any Material Agreement, which default will have a Material Adverse Effect.

5.11 Litigation

No actions, suits, proceedings or governmental investigation is pending or to the best of the Owner's knowledge, threatened against the Owner or the Company. To the best of the Owner's knowledge, neither the Owner nor the Company is in default with respect to any order, injunction or decree by any court or governmental department or agency.

5.12 Intellectual Property

The Company owns or has valid licenses, or other agreements to use, the Intellectual Property, free and clear of all liens, pledges, or other encumbrances. The use by the Company of the Intellectual Property does not infringe the rights of any third parties.

5.13 Employees

(a) True, complete and current copies of the employment contracts of the Key Employees listed in Schedule 5 have been provided to the Underwriters' counsel.

(b) No Key Employee has announced his or her termination of his or her employment with the Company.

(c) Other than the items stated in the contracts of the Key Employees, there are no deferred compensation agreements, pensions, profit sharing, severance pay, retirement plans or other agreement plans, practices or programs providing any employee benefits other than customary health and dental insurance.

(d) To the extent required by applicable law and the Accounting Principles, provisions have been made in the Accounts for the full amount of all present and future liabilities in respect of pension undertakings to be paid to current or former directors, officers or other employees of the Company.

(e) The Company has not received notice, which notice remains current, of any claim that it has not complied with any employment, labor or related laws.

(f) There are no collective bargaining agreements, to which the Company is a party in respect of its employees.

(g) There are no multiemployer plans (as defined on Section 3(37) of ERISA to which the Owner or any trade or business under common control (within the meaning of Section 414(b) or (c) or the Internal Revenue

Code is or has been required to make a contribution or other payment.

5.14 Environmental

(a) The Company has complied in all material respects with all relevant environmental laws and environmental licenses and all environmental licenses are valid and subsisting and the Company has not received any written notice that any such environmental license is being revoked, amended, varied, withdrawn or not renewed.

(b) No proceedings have been issued or are outstanding against the Company in respect of any breach of any legislation concerning the environment.

5.15 Insurance

The Insurance Policies are currently in effect and will be maintained up to Closing. The Insurance Policies collectively provide the types and amounts of insurance coverage normal and customary for similarly situated companies in the U.S.

5.16 Powers of attorney

Only employees of the Company having an appropriate position within the Company are authorized to sign for and to operate the Company's bank accounts. The name of each bank, savings institutions or other entity with which the Company

has an account and the names of such are attached as Schedule 8.

5.17 Conduct of Business

The activities of the Company during the period from the Accounts Date to this date have been conducted in accordance with the ordinary course of business with a view to maintaining the Company as going concern.

5.18 Relationship to the Owner and related companies

There are no other agreements between the Company and the Owner or any of its affiliated companies, officers, directors or stockholders other than in the ordinary course of business, than the convertible loan referred to in 5.5 above.

5.19 Subsidiaries and Joint Ventures

The Company has two fully owned subsidiaries, MIT Ltd. and MJI Pty. Ltd., but has no other right or option to acquire an equity interest in, any other entity, and the Company is not a participant, as a partner or otherwise, in any joint venture or common or pooled risk business enterprise.

5.20 No Liabilities to the Owner

The Owner represents and warrants to the Underwriters as at Closing that the Company has no liabilities to the Owner, other than as stated in the agreements attached as Schedule 2.

6. REPRESENTATIONS AND WARRANTIES OF THE UNDERWRITERS

The Underwriters hereby represents and warrants as at Closing that:

6.1 Power and authority of the Underwriters

(i) The Underwriters are companies duly organized, validly existing under the laws of their respective jurisdictions.

(ii) Upon approval of this Agreement by the Board of Directors and the approval of the General Meeting of the Shareholders as contemplated by Section 9 below, the Underwriters has full power and authority to subscribe to shares and to perform all other undertakings hereunder and the execution, delivery and performance of this Agreement. This Agreement is a valid and binding obligation of the Underwriters enforceable against the Underwriters in accordance with the terms herein.

6.2 Violation of Laws and Regulations

Assuming all filings, registrations, approvals, notifications etc. required by applicable laws are duly made, the execution and delivery of this Agreement by the Underwriters and the completion of the transactions contemplated hereby:

(i) will not violate any provision of the Articles of Association of the Underwriters;

(ii) will not violate any statute, rule, regulation, order or decree of any public body or authority by which the Underwriters or any of its properties or assets is bound; and

(iii) will not result in a violation or breach of, or constitute a default under, any license, franchise, permit, agreement or other instrument to which the Underwriters is a party, or by which the Underwriters or any of its properties or assets is bound,

excluding from the foregoing Sections (i) to (iii) violations, breaches or defaults which, either individually or in the aggregate, would not present the Underwriters from performing its obligations under this Agreement or the completion of the transactions contemplated by this Agreement.

7. COVENANTS AND OTHER UNDERTAKINGS OF THE PARTIES

7.1 The Owner shall afford to the officers, representatives and advisers of the Underwriters access to the plants, properties, books and records of the Company and will furnish to the Underwriters such additional financial and operation data and other information as to the business and properties of the Company (due diligence). Notwithstanding the above, the Owner shall provide such other information, and execute and deliver all such other and additional instruments, notices, releases, undertakings, consents and other documents, and shall do all such other acts and things, as may be

reasonably requested by Underwriters as necessary to assure to Underwriters all the rights and interests granted or intended to be granted under this agreement.

7.2 The Underwriters shall guarantee the subscription of a total of 3,876 newly issued shares in the Company, at a price of $516 per share. This shall be allocated with $1,750,000 for the Scandinavia Company and $250,000 for Plenteous Corp.

7.3 The Owner shall have a right to allocate among those of its shareholders, who owned more than 100,000 shares in the Owner on March 12, 1999, the right to subscribe to 1 share per 8,000 shares in the Owner, for a total maximum of 875 shares. If more than 875 shares are subscribed by others than the Underwriters, an allocation will be made pro rata to the number of shares owned on March 19, 1999.

The subscription price shall be $516 per share. The subscription period shall be from March 25 to April 9, 1999, with payment by April 16, 1999.

If any shares are subscribed by other shareholders, the remainder shall be subscribed by the Underwriters pro rata to the guarantee made. The Scandinavia Company is guaranteed a minimum of 2,626 shares out of a total 5,167 shares.

The shares will be paid for according to Schedule 1.

7.4 The Company shall on Closing assume all obligations the Owner has to third parties listed in Schedule 3. The Company shall further make best efforts to

replace the Owner as party to all those relationships. The Company shall assume no other obligations from the Owner to third parties. The parties agree that the activities in Sweden are to be discontinued in the most cost effective manner, and the Owner will make best efforts to minimize the cost.

7.5 The Owner shall have the right to appoint one member of the Board of the Company, subject to approval of the Underwriters for the individual selected. This right shall remain as long as the Underwriters hold a majority of the shares of the Company.

7.6 It is the intention of the Company to issue stock options for the staff according to what is customary for this type of company in the U.S.

8. INDEMNIFICATION

8.1 Breach of Warranties

Subject to Section 8.2, Owner shall indemnify and hold harmless the Company against and in respect of any damages, losses, costs or expenses that arise in connection with any breach by the Owner of the Warranties.

8.2 Limitation of Liability

8.2.1 The liability of the Owner shall be limited as follows:

(a) the Owner shall have no liability in respect of any breach or breaches of the Warranties unless the amount of the liability in respect of

such breach or breaches exceeds in aggregate the sum of USD 50,000 in which case (subject to the other provisions of this Section 8) the whole amount of the liability shall be payable;

(b) the maximum aggregate liability of the Owner in respect of all and any claims in respect of the Warranties shall not exceed USD 100,000; and

(c) liability in respect of the Warranties shall terminate on the first anniversary of Closing, except in respect of any claim of which notice in writing (specifying in reasonable detail the event, matter or default which gives rise to the claim and, if practicable, an estimate of the amount claimed) is given to the Owner before that date.

8.2.2 In case either the Company becomes aware of any claim for which the Owner may be liable, the Company shall, in order to maintain the right to bring a claim against the Owner:

(a) as soon as reasonably practicable, but in no event later than 90 days after the date the Company becomes aware of any circumstance giving rise to a claim, give written notice thereof to the Owner;

(b) not make any admission of liability, agreement or compromise with any person, body or authority in relation thereto, without obtaining the prior written consent of the Owner;

(c) take such action, as the Owner may reasonably request, to avoid dispute, appeal, compromise or defend such claim, with the proviso, however, that the Company accept or pay or compromise or make any submission in respect of such claim, without the Owner's prior written consent thereto; and

(d) give the Owner, or the Owner's duly authorized representatives, reasonable access to relevant accounts, documents and records of the Company to enable the Owner, or the Owner's duly authorized representatives, to examine such accounts, documents and records and to take photocopies thereof.

9. CONDITIONS PRECEDENT AND RIGHT OF TERMINATION

9.1 Conditions precedent to Closing:

(a) the Board of Directors of Underwriters and Owner shall have approved this Agreement and the transactions contemplated hereby.

(b) The Extraordinary General Meeting of the Owner shall have approved the issue of shares in the Company.

10. ANNOUNCEMENTS

No announcements concerning this transaction or any ancillary matter will be made before, on or after Closing by any party to this agreement (or any person connected with the party) except as required by law

or the rules of any stock exchange without the prior written approval of the Owner and Underwriters.

11. NOTICES

11.1 All notices, consents or other communications under or in connection with this Agreement shall be given in writing or by facsimile. Any such notice or consent will be deemed to be given as follows:

(i) if in writing, when delivered; and

(ii) if by facsimile, when received.

However, a notice given in accordance with the above but received on a non-working day or after business hours in the place of receipt will only be deemed to be given at the opening of business on the next working day in that place.

11.2 The addresses and facsimile numbers of each party for all notices under or in connection with this Agreement are:

(i) In the case of the Owner: Mirror Image Internet AB Att. Sverker Lindbo Box 1043 101 38 Stockholm fax: +468 506 255 01

(ii) In the case of the Underwriters: The Scandinavia Company, Inc. c/o Alexander Vik 10 Ashton Drive, Greenwich, Connecticut 06831 fax: 203 622 1610

and

Plenteous Corp c/o Excellen Advisors Corp
P.O. Box 162, CH 1936 Verbier fax: +41 27
775 3869

or such other as a party may notify to the other party by no less than five (5) Business Days' notice.

12. CONFIDENTIALITY

The parties undertake not to disclose any Confidential Information unless (i) required to do so by law; (ii) required to do so by any applicable stock exchange regulations; (iii) such disclosures are made in connection with the ordinary course of business of the Company; or (iv) disclosure has been consented to by the other party.

13. LANGUAGE

The language of this Agreement is English, and all documents and notices hereunder shall be in English unless otherwise agreed by both parties.

14. WHOLE AGREEMENT

This Agreement, including the Schedules hereto and other documents referred to herein which form a part hereof, contain the entire understanding of the parties hereto with respect to the subject matter contained herein and therein. All prior negotiations and agreements between the parties hereto with respect to the transactions provided for herein are superseded by this Agreement.

15. WAIVER

The failure of any party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver of any right hereunder, nor shall it deprive that party of the right thereafter to insist upon the strict adherence to that term or any other terms of this Agreement.

16. AMENDMENTS

No change, termination or attempted modification of any of the provisions of this Agreement shall be binding on the Owner or on the Underwriters unless agreed by both parties in writing. No modification, termination, rescission, discharge or cancellation of this Agreement shall affect the right of the Underwriters or the Owner to enforce any claim, whether or not liquidated, that accrued prior to the date of such notification, termination, rescission, discharge or cancellation of this Agreement.

17. INVALIDITY

If for any reason any term, warranty, representation, covenant or condition herein shall be declared or deemed void, invalid or unenforceable, such shall not render void, invalid or unenforceable this Agreement or any other term, covenant or condition herein contained if in spite of the exclusion of the invalid provision, the Agreement can be given effect in line with the main purposes of the parties.

18. ASSIGNMENT

This Agreement may not be transferred, assigned,

pledged or hypothecated by any party hereto, other than by operation of law. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and permitted assignees.

19. FEES AND EXPENSES

Except as otherwise set forth in this Agreement, each party shall pay its own and its advisers' fees and expenses (including financial and legal advisors) whether relating to the preparation, the carrying out of this Agreement, the Closing hereunder or the completion of the transactions herein contemplated and no such fees or cost will be charged to the Company.

20. GOVERNING LAW AND DISPUTES

20.1 This Agreement shall be governed by the substantive laws of Sweden.

20.2 Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitration tribunal shall be composed of three arbitrators. The place of arbitration including the making of the award shall be Stockholm, Sweden. The language to be used in the arbitration proceedings shall be English.

IN WITNESS WHEREOF, the parties have duly executed this Agreement in three (3) originals on the date first written above.

Mirror Image Internet AB

/s/_____

Mirror Image Internet Inc.

/s/_____

Supreme Court, U.S.
FILED
APR 8 2003
CLERK

No. 02-1320

IN THE

Supreme Court of the United States

MIRROR IMAGE INTERNET, INC., XCELERA, INC., ALEXANDER M. VIK, GUSTAV VIK, and HANS MAGNUS FAJERSON,

Petitioners,

v.

PARFI HOLDING AB, PLENTEOUS CORPORATION, GRANDSEN, LTD., and GUNNAR GILLBERG

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Delaware Supreme Court's determination that, under Delaware law, a broadly drafted arbitration clause did not require arbitration of the specific fiduciary duty and corporate opportunity claims at issue implicates and is inconsistent with the Federal Arbitration Act, where the court's decision was based on the fact that:

(a) the contract at issue did not establish rights and obligations extensive enough to encompass the dispute;

(b) the claims at issue did not bear on duties and obligations under the contract; and

(c) the claims at issue did not, in any way, implicate the contract, but rather rested on independent rights provided by Delaware corporate law.

RULE 29.6 STATEMENT

Respondent, Parfi Holding AB, has no parent company and is a public company under Swedish law. Petitioner, Xcelera, Inc., which is publicly traded on the American Stock Exchange, owns approximately 15% of Parfi Holding AB. Respondents, Plenteous Corporation and Grandsen Ltd., have no parent companies and no publicly held company owns 10% or more of the stock of either such corporation.

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STATEMENT OF JURISDICTION

The Respondents contest the Petitioners' assertion of jurisdiction. The Federal question presented by this petition was not raised in a timely fashion before the Delaware Supreme Court, was not passed on by that court, and the court's order does not constitute a final order pursuant to 28 U.S.C. § 1257(a).

I. STATEMENT OF THE CASE

Contrary to Petitioners' "Statement," this case neither presents a question of "broad importance to the enforceability of arbitration clauses under the Federal Arbitration Act," nor involves interpretive principles at odds with "this Court's jurisprudence interpreting and applying the FAA." Rather, this case involves the Delaware Supreme Court applying Delaware state law principles of contract construction to interpret the scope of an arbitration clause. Indeed, prior to Petitioners filing their Motion For Reargument, Petitioners advocated the application of Delaware state law to the exclusion of any law that may be applicable in other jurisdictions, including Federal jurisprudence under the FAA. In any event, the contract principles applied by the Delaware Supreme Court are fully consistent with the legal principles utilized under the FAA as well as that of sister states.

At its heart, what the Delaware Supreme Court held was that the scope of an arbitration clause is not determined in a vacuum; rather, interpretative principles require that the subject matter of the entire agreement be considered in order to determine the nature of the claims that the parties consensually agreed to submit to arbitration. Where, as in this case, the parties entered into an agreement of limited

subject matter (i.e., a one-time capital raising event), the arbitration clause, though broadly drafted, did not encompass fiduciary duty and corporate opportunity claims that sprang solely from the status of the parties as shareholders and/or directors of a Delaware corporation. Because the claims in the litigation depended neither on any substantive provision of the agreement containing the arbitration clause, nor required interpretation of any provision of the agreement in order to determine any parties' rights or obligations, the Delaware Supreme Court held that the litigation claims were not claims that the parties had consensually agreed to arbitrate.

Independent of these facts is the issue of this Court's lack of jurisdiction to accept this appeal. The Federal issue was raised only in a Motion For Reargument following the Delaware Supreme Court's ruling and the court's denial of that motion without opinion. Moreover, because state law principles of contract construction were applied at the urging of all parties, no Federal policy is threatened by the ruling. Lastly, the decision cannot be characterized as either unexpected or a departure from prior law. There simply is no basis for jurisdiction.

II. STATEMENT OF FACTS

The Delaware litigation involves the allegations of breaches of fiduciary duty and misappropriation of corporate opportunity stemming from certain actions taken by Xcelera, Inc. ("Xcelera") as majority shareholder, and Alexander and Gustav Vik and Hans Magnus Fajerson (the "Individual Defendants") who sat as directors of both Mirror Image Internet, Inc. ("Mirror Image") and Xcelera. (App. 4-5). Contrary to the opening sentence of Petitioners' factual

recitation, this case does not involve "a contract among" the parties. There was a contract between the parties; but that contract, the Underwriting Agreement, dealt principally with a singular event – the raising of $2MM in capital and the reapportionment of shareholding interests in Mirror Image as a result. (App. 14-15).[1] While that contract did contain a broad arbitration clause, had nothing to do with corporate governance or the on-going relationship between the shareholders and/or the directors of Mirror Image. The underlying litigation is not based on that contract.

Rather, in the months that followed the parties' execution of the Underwriting Agreement, Xcelera and the Individual Defendants engaged in four transactions that the Respondents assert violated canons of Delaware corporate law. The first three transactions (denoted as the April and July transactions and the November preferred stock offering) involved the issuance of "watered-down" stock to Xcelera and the concomitant unfair dilution of the minority shareholders' interests in Mirror Image. (App. 4-5). Each of these transactions amounted to a breach of the fiduciary duty owed by both the directors to the minority shareholders and the majority shareholder to the minority. The fourth transaction involved the misappropriation of a corporate opportunity by Xcelera. Specifically, in the winter of 2000, an independent corporation, Exodus Communications, Inc. ("Exodus"), expressed an interest in making a multi-million dollar investment into Mirror Image. At a time when Mirror Image was still a start-up company that had yet to achieve operational profitability and desperately needed the money to implement its ambitious business plan, Xcelera and the Individual Defendants structured the transaction such that

1. The Underwriting Agreement also created certain rights to appoint directors (App. 15).

75% of the Exodus "investment" was received directly by Xcelera, not Mirror Image. (App. 5).

None of these causes of action implicates the Underwriting Agreement in any way. None requires an interpretation of any provisions of that agreement. None of the duties or obligations alleged to have been violated exists because of that agreement.

It is the case that the Underwriting Agreement contained an arbitration clause pursuant to which any claim "arising out of or in connection with the Agreement or the breach, termination or invalidity thereof" was committed to arbitration in Sweden. (App. 104, § 20.2). It is also the case that an arbitration proceeding was commenced in Sweden approximately six months prior to the filing of the Delaware Complaint, and that a subsequent hearing was held concerning those claims. (App. 6-7). The arbitration claims alleged fraud in the inducement (i.e., under Swedish law: failure of assumption) and breach of contract. In part, those proceedings involved an evaluation of the same four transactions to determine whether they provided circumstantial evidence of Xcelera's fraudulent intent as of the earlier date of negotiation and execution of the Underwriting Agreement. The four transactions were also evaluated to determine if they constituted "corporate action" within the meaning of a side-letter agreement between Xcelera and Plenteous Corporation.[2] (App. 16-17). Following the hearing, the arbitration tribunal ("Tribunal") expressly stated that its evaluation of those transactions did not implicate stockholder rights under Delaware law. (App. 6-7 & 15-16).

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2. Plenteous was an underwriter pursuant to the Underwriting Agreement. Plenteous is also a minority shareholder and a plaintiff in the Delaware state court litigation.

What lay at the base of the dispute between the parties regarding arbitrability, and the point of disagreement between the Delaware Chancery and Supreme Courts, was whether, in the face of a broadly drafted arbitration clause, discrete claims emanating from a partially common core of facts could result in both arbitrable and nonarbitrable claims in light of the scope of the subject matter of the agreement containing the arbitration clause. In evaluating whether the claims at issue were arbitrable, the Delaware Supreme Court stated that because the arbitration clause was broad in scope, it would "defer to arbitration on any issues that touch on contract rights or contract performance." (App. 10). Thus, the issue as framed by the Delaware Supreme Court was whether the fiduciary duty claims or corporate opportunity claims "implicate any of the rights and obligations provided for in the Underwriting Agreement." (*Id.* at 11). To answer this question, the Delaware Supreme Court analyzed all of the provisions of the Underwriting Agreement to see what rights and obligations were created. (*Id.* at 12-15). Finding that the Underwriting Agreement pertained only to "the rights related to the initial offering of Mirror Image Stock," (App. 18), the court held that the Underwriting Agreement did "not establish rights and obligations extensive enough to encompass" the fiduciary duty and corporate opportunity claims at issue in the litigation. The court stated:

> While some agreements, by their nature, extend so far as to mandate arbitration for breach of fiduciary duty claims, the Underwriting Agreement here did not.

(App. 19).

Following the Delaware Supreme Court's decision, the Petitioners filed a Motion For Reargument, raising for the first time the assertion that the "Opinion adopted a policy concerning arbitration agreements that conflicts with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA")." (App. 70). In opposition, Respondents argued that the assertion of inconsistency came too late in the proceeding and was thus dismissible on that ground alone. (App. 76-77) (*citing Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980)). Thereafter, in a one page order, the Delaware Supreme Court denied Petitioners' motion saying only that: "(3) The Court has carefully considered the motion for reargument and the answer, and concludes that the motion should be denied." (App. 69). This petition followed.

III. REASONS FOR DENYING THE PETITION

There are two reasons why this Court should deny the Petition for Writ of Certiorari. First, this Court plainly lacks jurisdiction. The Federal question was not timely raised nor expressly ruled on by the Delaware Supreme Court. No substantial Federal policy is implicated, let alone threatened, by the Delaware Court's decision because that decision was based on Delaware state law that all parties argued was controlling. The Delaware Court's decision also does not represent a departure from pre-existing Delaware law or an unanticipated result that first implicated the Federal question. Second, the Delaware Supreme Court's decision is entirely consistent with both precedent from this Court and decisions from myriad Federal circuit and district courts, we well as other state courts.

A. This Court Lacks Jurisdiction Over The Appeal

The Petitioners concede that they never argued the applicability of the FAA either before the trial court or during the briefing or arguing of the appeal.[3] It was only after receiving an adverse decision that Petitioners filed a motion to reargue raising alleged inconsistency between the Delaware Supreme Court's application of state law principles of contract construction with those principles as applied under the FAA.

The Petitioners advance three reasons why their belated filing vests this Court with jurisdiction. First, Petitioners say the late filing was timely because the Delaware Supreme Court considered the Federal issue raised. Next, Petitioner asserts that the Delaware Supreme Court decision was both unexpected and a departure from established Delaware State law and they thus raised the Federal issue at the first opportunity. Third, they argue that the fourth of the so-called *Cox*[4] factors renders that late considered filing a final judgment under 28 U.S.C. § 1257. None of the reasons afford jurisdiction on the facts of this case.

1. The Petitioners Did Not Timely Raise The Federal Question

Petitioners' assertion that the raising of a Federal question on a motion for reargument following an adverse appellate decision is timely if that court considers it is fine as far as it goes. The problem for Petitioners is that the

3. In fact, there were two oral arguments on appeal – once before a three judge panel; and once before the entire five judge panel.

4. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Delaware Supreme Court did not consider the Federal question in the manner prescribed by this Court's jurisprudence. This Court has long held "that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after the court has pronounced its final decision." *McCorquodale v. Texas*, 211 U.S. 432, 437 (1908); *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945) (same); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (same); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) (same); *Citizens Nat'l Bank v. Durr*, 257 U.S. 99, 106 (1921) (same); *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 326, 334 (1913) (same). One exception to this rule is where the state court actually entertains and considers the late raised Federal question. *E.g.*, *McCorquodale*, 211 U.S. at 437 ("if the court entertains the motion and passes on the Federal question, we will review its decision"). Although petitioners assert this is what has happened, a review of the Delaware court's denial of that motion under this Court's precedent establishes that it did not. The Delaware Supreme Court denied the Petitioners' Motion for Reargument as follows: "(3) The Court has carefully considered the motion for reargument and the answer, and concludes that the motion should be denied." (App. 69). As can be readily seen, the Delaware Supreme Court gave no indication that it evaluated the Federal question and disposed of it on its merits. From the record, it is just as likely that the court disposed of the motion as untimely, one of the bases argued by Respondents in their answer to the motion. (App. 76-77). *See Fullerton v. Texas*, 196 U.S. 192, 194 (1905) (where court denies petition without expressly addressing Federal question, a reasonable inference is that the court simply refused to pass on the Federal question because it was raised too late). This type of disposition has been repeatedly found to be insufficient to

confer jurisdiction on this Court. For example, in *McCorquodale*, this Court held that the state court's order denying a motion for rehearing did not show that it had decided the Federal question even though that order stated that the "appellant's motion" was "considered by the court." *McCorquodale*, 211 U.S. at 437. Similarly, in *Forbes v. State Council*, 216 U.S. 396, 399 (1910), this Court found that a state court's order stating that the motion for rehearing was denied after "mature consideration" was insufficient to establish that the court had in fact decided the Federal question. *See also Citizens Nat'l Bank*, 257 U.S. at 106 (where petition denied "without reasons given," jurisdiction does not exist); *Missouri ex rel. Missouri Ins. Co.*, 281 U.S. at 320 ("Ordinarily [the Supreme Court] will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more."); *Consolidated Turnpike*, 228 U.S. at 333-34 (court found that the "words 'maturely considered' do not import any decision of the question made.").

Where jurisdiction has been found, it has been because the state court rendered an opinion clearly and expressly addressing the Federal question. For example, in *Illinois Cent. R.R. Co. v. Kentucky*, 218 U.S. 551, 556 (1910), this Court found jurisdiction because the state court had "extended its opinion, holding that no right of the appellant under the Fourteenth Amendment had been violated by the decision."

The Petitioners' reliance on *Cox Broadcasting*, actually undercuts them. In *Cox*, this Court found jurisdiction precisely because the Georgia Supreme Court specifically addressed the First Amendment issue in its denial of the motion for rehearing. The Georgia court expressly stated:

"A majority of this court does not consider this statute to be in conflict with the First Amendment." 420 U.S. at 476. On review, this Court stated:

> Since the court relied upon the statute as a declaration of the public policy of Georgia that the disclosure of a rape victim's name was not to be protected expression, the statute was drawn in question in a manner directly bearing upon the merits of the action, and the decision in favor of its constitutional validity invokes this Court's appellate jurisdiction.

Id. The case of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), is not to the contrary, and Petitioners' reliance on it is misplaced. *Eddings* involved a different jurisdictional exception: that is, where a petition for rehearing is the first opportunity to raise the Federal question due to an unexpected decision or departure for pre-existing precedent. *Id.* at 113 n.9. In such circumstances, jurisdiction will exist even where the state court denies the petition without opinion. (*See* argument *infra* at III.A.2).

As this Court's precedents thus make clear, for a motion for rehearing to timely raise a Federal issue such that this Court has appellate jurisdiction, the state court of last resort must expressly address the Federal issue in its disposition of that motion. A simple denial without more is insufficient to establish jurisdiction.

2. The Delaware Supreme Court Decision Is Neither Unexpected Nor A Departure From Established Delaware Law

Petitioners also argue that because the Delaware Supreme Court's decision was, in the words of that court, a "case of first impression," the court's decision was either an unexpected interpretation of state law or a reversal of that court's prior interpretation of the law such that the Federal rights were first implicated by the decision. (Pet. Br. at 26). *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 86-87 & n.9 (1980). If such a circumstance truly exists, raising the issue for the first time in a motion for rehearing is apparently timely even where the motion is denied without opinion. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). The question thus becomes "whether the ruling here assailed should have been anticipated," *Herndon*, 295 U.S. at 444, or whether there was a departure from pre-existing decisions. *Eddings*, 455 U.S. at 113 n.9. Here, the Petitioners cannot make the necessary showing that the decision was either unanticipated or a reversal of prior state law. As to the latter, the court stated that this was a case of first impression. Moreover, there is nothing in the Delaware Court's earlier decisions that is contrary. In both *Elf Atochem N. Am. v. Jaffari, Inc.*, 727 A.2d 286 (Del. 1999), and *SBC Interactive Inc. v. Corporate Media Partners*, 714 A.2d 758 (Del. 1998), the Delaware Supreme Court affirmed findings that all claims at issue were arbitrable, specifically because the agreements at hand were corporate governance documents that broadly covered the entire relationship between the parties, and the claims at issue implicated those agreements. *See SBC Interactive*, 714 A.2d at 759-760; *Elf Atochem*, 727 A.2d at 287, 295. In fact, in finding the claims in this case nonarbitrable, the court cited to *Elf Atochem* as an example of an agreement that, "by its

nature, extended" "so far as to mandate arbitration of breach of fiduciary duty claims." (App. 19 & n.42).

The decision also can not be fairly characterized as an unexpected interpretation of state law both because there is no contrary Delaware law in existence and the court expressly noted that a number of courts from other jurisdictions adopted the test articulated by the court in its opinion. (App. 10 n.15). Accordingly, jurisdiction is not proper under this exception.

3. This Court Does Not Have Jurisdiction Under The Fourth Cox Factor

Even if this Court were to rule that the Federal question was timely raised and expressly considered by the Delaware Supreme Court, jurisdiction would still be lacking because the state court decision is not a final order as required by 28 U.S.C. § 1257, and the fourth *Cox* factor is inapplicable. Under the fourth *Cox* factor, this Court may review a non-final state court decision "where the Federal issue has been finally decided in the state courts with further proceedings pending that could result in the party seeking review prevailing on non-Federal grounds and the failure to immediately review the state-court decision might seriously erode Federal policy." *Cox*, 420 U.S. at 483. This Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), however, establishes that jurisdiction is improper under this exception because the Delaware Supreme Court decision does not threaten to seriously erode Federal policy.

In *Southland*, this Court addressed two separate issues under the fourth *Cox* factor arising out of the California Supreme Court's ruling concerning the arbitrability of certain

statutory claims under a contract whose arbitration clause was governed by the FAA. With regard to the California court's holding that state franchise law rendered the claims arising under the contract nonarbitrable, this Court found the fourth *Cox* factor applicable because absent immediate review "there would remain in effect an unreviewed decision of the state" that in effect held that the California statute invalidating an agreement to arbitrate did not conflict with the FAA. This nullification or invalidation threatened to seriously erode the Federal policy manifest in the FAA to enforce contacts to arbitrate. 465 U.S. at 7.

As to the second issue, however, this Court found no jurisdiction because Federal policy was not implicated. The second issue concerned the California court's decision superimposing state class-action procedures on the arbitration proceedings. Throughout the state court proceedings, Southland argued that state law prohibited arbitrations from proceeding as class actions and that the Federal Rules of Civil Procedure did not apply. In keeping with the parties' arguments, the California court ruled that a class action structure for arbitration was permitted under state law. *Id.* at 9 n.4. Because Southland did not challenge the validity of the state statute on Federal grounds, there was no threat to Federal policy and this Court lacked jurisdiction to hear the appeal. *Id.* at 9.

Southland is controlling here. Throughout these proceedings, Petitioners' proceeded under the premise that Delaware State law governed the determination of the scope of the arbitration clause. In fact, at the trial court level, the Vice Chancellor stated that "all parties have argued this aspect of the motion under the assumption that Delaware law governs the question of whether Parfi's claim is arbitrable. . . . In keeping with the parties' choice, I therefore apply the settled principles

of Delaware law . . .". (App. 36-37). Similarly, the Delaware Supreme Court ruled that this was "a case of first impression in Delaware." (App. 10). In short, the determination of whether the particular claims at issue were arbitrable was decided (by choice of the parties) under state law as opposed to Federal law. Thus, even if the decision could be characterized as inconsistent with Federal policy, which it cannot, no threat to Federal policy can be found. This Court so ruled in *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989). In *Volt*, although the contract at issue was clearly covered by the FAA, the Court found that the parties had "agreed to arbitrate in accordance with California law." *Id.* at 477. Analyzing the policy goals underlying the FAA, the Court stated that while the FAA preempted any state law mandating a judicial forum for claims otherwise agreed to by the parties to be arbitrated, it did not follow that the FAA prevented the enforcement of the parties' agreement to arbitrate under different rules from those provided by the FAA. *Id.* at 478-479. Thus, under this Court's holding in *Volt*, the parties are free to select state law as governing the scope of their agreement to arbitrate even where the contract otherwise falls within the FAA. *See, e.g., Ford v. Nylcare Health Plans*, 141 F.3d 243, 248 & n.6 (5th Cir. 1998) (parties are free to select state law to govern the scope of their agreement to arbitrate). In arguing for the application of state law throughout these proceedings, the parties have agreed that state law should control the interpretation of the scope of the arbitration clause.

Moreover, unlike the first issue in *Southland*, or the other cases cited by Petitioners such as *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Rodriquez de Quijas v. Shearson-Lehman American Express, Inc.*, 490

U.S. 477 (1989); and *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); the Delaware decision does not serve to invalidate the arbitration clause at issue or declare any particular category of claims nonarbitrable. *See* argument *infra* at III.C. Rather, the Delaware decision simply applied routine state law principles of contract construction to determine whether the contract at hand, including the arbitration clause contained therein, subjected the particular claims at issue to arbitration. Ironically, in so doing, the Delaware court expressly relied on a variety of cases from other jurisdictions, including cases decided under the FAA, as analogous support for the result reached. (App. 10 n.15, 13 n.24, 16 n.27). Even more ironically, Petitioners originally argued below that the Federal cases relied on by Respondents were inapposite, expressly because only Delaware state law was relevant.[5] (App. 77).

In sum, because Petitioners argued below that state law controlled the interpretation of the scope of the arbitration clause, and the Delaware Supreme Court so decided, no threat to an important Federal policy is implicated and this Court does not have jurisdiction to hear this appeal.

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5. Even if one could argue that in relying on the Federal cases for analogous support the Delaware Court misapplied correctly articulated Federal interpretive principles, no Federal policy would be implicated sufficient to invoke jurisdiction. Supreme Court Rule 10 expressly states that: "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings *or the misapplication of a properly stated rule of law.*" Sup. Ct. R. 10 (emphasis added).

B. The Delaware Supreme Court Decision Is Consistent With This Court's Approach To Interpreting The Scope of Arbitration Clauses

Jurisdiction aside, this Court should refuse the Petition because the Delaware Supreme Court applied principles entirely consistent with this Court's precedent. The Delaware Supreme Court ruled that an "arbitration clause, no matter how broadly construed, can extend only so far as the series of obligations set forward in the underlying agreement. Thus, the arbitration clause should be applied only to claims that bear on the duties and obligations under the Agreement." (App. 11-12). In other words, the court held that the arbitration clause is not viewed in a vacuum. Rather, it is considered in the context of the contract at issue: that is, what is the subject matter of the contract and how do the claims at issue relate to that subject matter. Looking through that lens, the Delaware Court saw that even though broadly drafted, the arbitration clause "signals only an intent to arbitrate matters that touch on the rights and performance related to the contract." (App. 12). In order to determine whether the claims at issue "touched on" such rights, the Delaware court asked whether those claims stood entirely independent of the contract. Put differently, did the claims implicate rights arising out of the contract or was interpretation of any provision of the contract necessary in order to determine liability under the claims. (App. 13-16 & n.24). Ultimately, the Delaware Supreme Court held that under the facts of this case, the "Underwriting Agreement did not established rights and obligations extensive enough to encompass the [fiduciary duty and corporate opportunity] dispute Parfi has brought in the Court of Chancery." (App. 14).

It is this formulation that the Petitioners characterize as in "conflict with this Court's interpretation and application of the FAA."[6] The Petitioners' characterization is wrong. To the contrary, the methodology utilized by the Delaware Supreme Court is entirely consistent with that endorsed by this Court. The decision most directly on point from this Court is *Mitsubishi*. In *Mitsubishi*, the Court was faced with determining whether antitrust claims arising out of an international commercial contract were *per se* nonarbitrable. 473 U.S. at 628. In the process of reviewing the decision of the First Circuit Court of Appeals holding that they were, this Court also discussed the First Circuit's methodology for determining whether the antitrust claims first fell within the scope of the arbitration clause at issue. *Id.* at 622 n.9. Under the First Circuit's analysis, only those antitrust claims that turned on specific substantive provisions of the sales agreement at issue fell within that agreement's arbitration clause. Although this Court expressly stated that given the First Circuit's ultimate holding (i.e., that the antitrust claims arising from the international contract were, as a matter of policy, nonarbitrable), "[w]e therefore have no reason to review the Court of Appeals' construction of the scope of the arbitration clause . . . ," *id.* at 625 n.13, it went on to state that "insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles

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6. U.S. Supreme Court Rule 10 states that "a petition for certiorari will be granted only for compelling reasons." By way of example, Rule 10 states that such a reason may exist where:

> (c) a state court . . . has decided . . . an important Federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10(c).

[of the Sales Agreement], the Court of Appeals properly resolved any doubts in favor of arbitrability." *Id.* In other words, this Court approved the First Circuit's approach to arbitrability: determine whether the claims, statutory or otherwise, were grounded in some way in the provisions of the contract that contained the arbitration clause. While this Court's comments in *Mitsubishi* are plainly dicta, Federal courts throughout this country have repeatedly applied the same analysis as the First Circuit in determining the proper scope of an arbitration clause.

For example, the Tenth Circuit Court of Appeals in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995), was faced with determining whether the several antitrust claims raised there were subject to arbitration under the parties' agreement. In determining the arbitrability of these series of claims, the court held that only those "claims that have a reasonable factual connection to the contract" containing the arbitration clause were arbitrable. *Id.* at 1516. In the words of the Tenth Circuit, "[a] dispute within the scope of the contract is still a condition precedent to" involuntary arbitration. *Id.* (*citing AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986)).

Similarly, in *Hersman Inc. v. Fleming Cos.*, 19 F. Supp. 2d 1282 (M.D. Ala. 1998), the court stated that:

> [t]he key inquiry in determining whether the tort claims are subject to the arbitration provision is the relationship between the plaintiffs' claims and the contractual obligations.

Id. at 1286. In finding the tort claims there non-arbitrable, the court held that those claims did not implicate performance

of duties under the contract, inquiry of the terms of the contract was not needed, and the contractual relationship was not a necessary predicate for the existence of the claims. *Id.* at 1287.

The same test was applied by the Second Circuit in *Genesco, Inc. v. T. Kativchi & Co.*, 815 F.2d 840 (2d Cir. 1987). There the court found the plaintiff's RICO claim arbitrable because the "wire, mail and transportation fraud allegations which form the predicate acts of Genesco's RICO claim all derive from the parties' transactions under the sale agreements." *Id.* at 848.

More recently, the Second Circuit held again that when a broad arbitration clause exists, arbitration will be ordered only "if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it.'" *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) (quoting *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 23 (2d Cir. 1995)).

The Ninth Circuit also applied the same interpretive analysis in *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999). In *Simula*, the Court stated that the arbitration clause at issue would sweep within its reach all claims that "touch matters covered by the contract containing the arbitration clause . . ." *Id.* at 721. The court then held that the antitrust, Lanham Act and defamation claims were all arbitrable because each either depended on the existence, performance and/or interpretation of the substantive provisions of the contract itself. *Id.* at 721-25.

The Fifth Circuit has applied the same test in analyzing arbitrability under Texas state law.[7] In *Ford*, the court stated that a claim is arbitrable "if it is 'so interwoven with the contract that it could not stand alone, but is not arbitrable if it is completely independent of the contract and could be maintained without reference to a contract.'" 141 F.3d at 250 (*quoting X.L. Ins. Co. v. Hartford Accident & Indem. Co.*, 918 S.W.2d 687, 689 (Texas App. 1996)); *see also D.J. Mfg. Corp. v. Tex-Shield, Inc.*, 998 F. Supp 140, 143-44 (D.P.R. 1998) (arbitration clause "cannot be held to extend to all disputes between those two parties, unless they are somehow linked to the provisions of the contract"); *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93-95 (4th Cir. 1996) (arbitrability of claim depends on the significance of its relationship to the substantive provisions of the contract); *Sharja L.P. v. Choice Hotels Int'l, Inc.*, No. Civ. A. 3:01-CV-2605-X, 2002 WL 107171, at *2 (N.D. Tex. Jan. 22, 2002) (tortious interference claim arbitrable because it depended "as a legal matter, on whether the parties complied with the terms of the Franchise Agreement"). *See also generally Bass v. SMG, Inc.*, 765 N.E.2d 1079, 1089 (Ill. App. Ct. 2002) (to determine if a significant relationship exists between the claim asserted and the contract containing the arbitration clause court must examine the "specific links between the claims alleged and the subject matter of the agreement"); *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278, 1284 (Colo. App. 2001) (claim is arbitrable if "factual basis implicates the rights and obligations created by a particular agreement").

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7. The court held in *Ford* that there was 'no perceptible difference between the federal and Texas standards . . ." for determining arbitrability. 141 F.3d at 250 n.7.

In short, all of these cases examine the subject matter of the contract containing the arbitration clause in order to determine whether the claims at issue implicate that contract in some meaningful way. Does the contract create rights subsequently violated? Does the contract impose obligations that were breached? Can the existing claim only be decided by interpreting specific provisions of the agreement? If the answer to any of these questions is yes, the claim is arbitrable. If, however, the answer to all of them is no, then the claim is not arbitrable. This is the test the Delaware Supreme Court applied when it held that "arbitration clauses should be applied only to claims that bear on the duties and obligations under the Agreement." (App. 12). The fact that the claims shared, in part, a common set of facts was not and is not relevant. *See, e.g., Dean Whittier Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("preeminent concern of Congress in passing the Act was to enforce private agreements . . . to arbitrate, even if the result is 'piecemeal' litigation . . .").

As there is no inconsistency between the state law principles applied by the Delaware Supreme Court and those applied by this Court and the lower Federal courts under the FAA, the Petition should be denied.

C. The Delaware Decision Does Not Exempt Fiduciary Duty Claims From Arbitration

Petitioner's assertion that the Delaware Supreme Court has ruled that corporate fiduciary duty claims are *per se* nonarbitrable is simply wrong. (*See* Pet. Br. at 13-15). In fact, as pointed out in Section III.A.2 above, the Court expressly noted that "some agreements, by their nature extend so far as to mandate arbitration for breach of fiduciary duty claims . . ." (App. 19 & n.42). But under the facts of this

case, it was not to be presupposed, absent clear language to the contrary, that fiduciary duty claims arising out of the status of the parties as majority and minority shareholders of a Delaware corporation, were intended by the parties to be arbitrable where the subject matter of the agreement was otherwise so limited in scope. In other words, the fiduciary duty claims were nonarbitrable because they did not implicate in any way the rights and obligations created by the contract and interpretation of the contract was not necessary in order to resolve the claims. The court did not rule that fiduciary duty claims are inherently nonarbitrable. Thus, this is not a case where a state law or court ruling impermissibly invalidates arbitration as to specified claims. *See* cases cited *supra* at III.A.2.

Moreover, contrary to the Petitioners' assertion, the Delaware court did not rule that all claims that have a legal basis independent of the contract were *per se* nonarbitrable. Rather, after noting that the Delaware Chancery Court properly ruled that the fiduciary duty claims did not arise out of the contract, the court held that the "in connection with" language did not render those claims arbitrable if they would otherwise be assertable if no contract ever existed. (App. 14). In other words, the contract was not necessary in any way for the maintenance of the claims. Again, this is consistent with the interpretive principles the Federal courts have used in construing the scope of arbitration clauses under the FAA.

CONCLUSION

For the reasons set forth above, the Respondents request that the court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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